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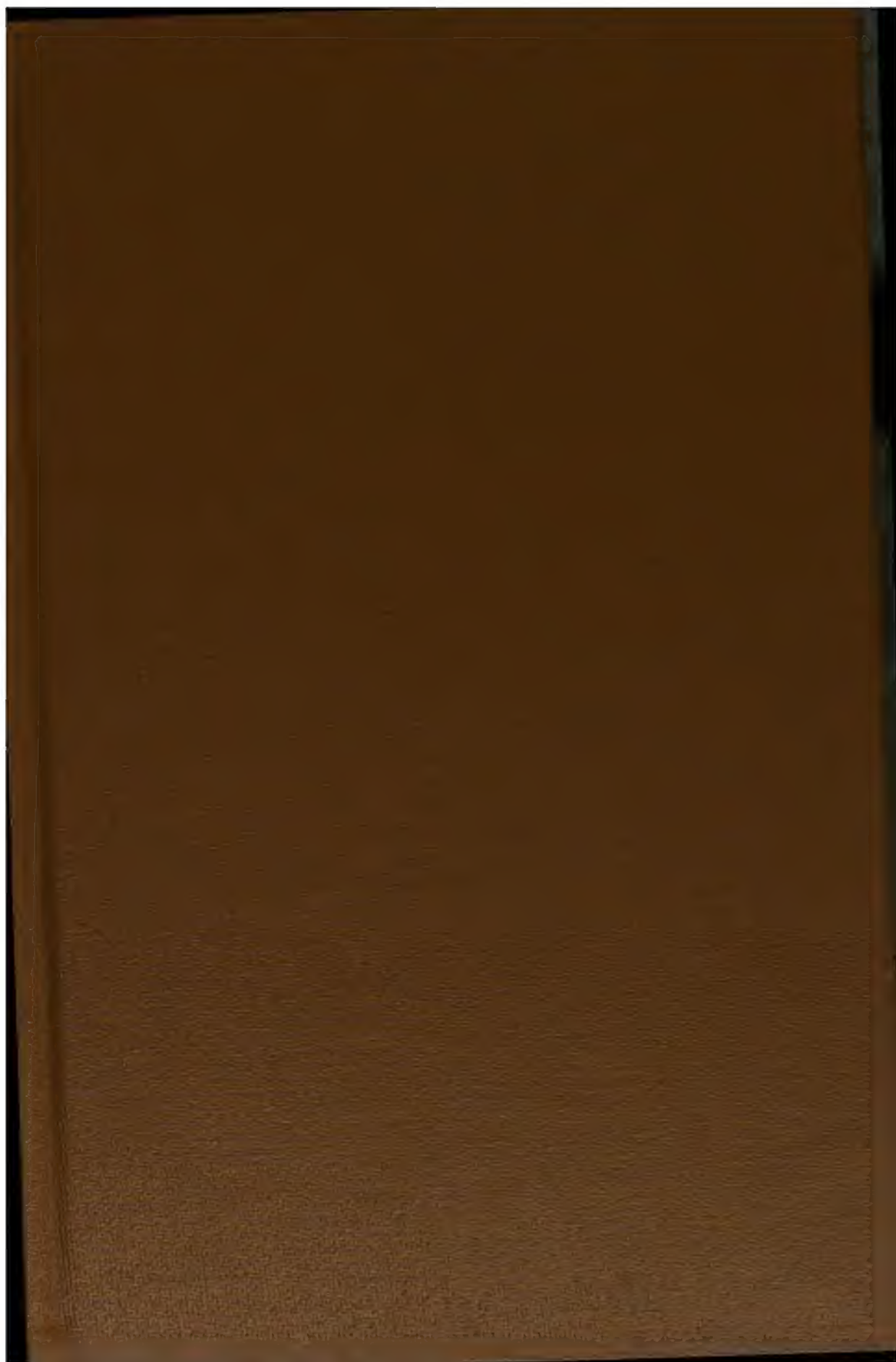
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A TREATISE
ON THE
AMERICAN LAW OF GUARDIANSHIP
OF
MINORS AND PERSONS OF UNSOUND MIND.

A TREATISE
ON THE
AMERICAN LAW OF GUARDIANSHIP
OF
MINORS AND PERSONS OF UNSOUND MIND.

BY
J. G. WOERNER,
AUTHOR OF "THE AMERICAN LAW OF ADMINISTRATION."

BOSTON:
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PREFACE.

THE law relating to Guardians of Minors and of Persons of Unsound Mind has not, so far as I am aware, been treated by any text-writer, except as included in books of a more general scope. Thus, Schouler and Reeves discuss the American law in relation to Guardians and Wards, in their respective works on Domestic Relations, and Buswell treats of the subject of the Guardianship of Lunatics, in his learned work on Insanity. Numerous allusions to the subject are also contained in works on Equity Jurisprudence, Infancy, Real Estate, Trustees, etc. The attempt is made in the present treatise to present and discuss the law governing the relations between guardians of minors and of persons incompetent to manage their own affairs, and their wards, as a special branch of jurisprudence: the feature distinguishing which from the general scope of jurisdiction cognizable in courts of law, being that it provides for the management of the property of those who are conclusively presumed, or adjudged, to be incompetent to manage it themselves. This peculiar quality of the property of infants and incompetents, that is, the necessity of its management by some authority other than that of its owner, invokes the direct interposition of the State, which, under our form of government, performs the functions assigned under the English common law to the King, as *parens patriæ*. As in England the King, so in America the

State, is the general protector of all infants, idiots, and lunatics, that is, of all of those who cannot protect themselves. While in England this branch of jurisdiction belongs almost exclusively to the Lord Chancellor and courts of equity, it is in the United States mostly relegated to that class of courts to which is intrusted also the supervision over the estates of deceased persons, thus carrying into practical realization the theory distinguishing between that class of courts whose function is to return to the individual the legitimate fruition of his deed, and those courts created to supply the rational element of ownership lacking in minors and persons of unsound mind. The present treatise is, therefore, not only a companion volume to the work on "The American Law of Administration," but in reality the complement thereof, filling up the outlines therein indicated as the scope of that element of jurisdiction, the original exercise of which is, in America, conferred upon a distinct class of courts usually known as probate or testamentary courts. In the "Law of Administration," the logical basis and scope of this class of courts (see Introduction, Sections 10, 11), as well as their historical development in the United States (see Sections 140, 141), is pointed out. "The American courts of probate," it is there shown, "with their extensive powers, their simple and efficient procedure, their happy adaptation to the wants of the people in the safe, speedy, and inexpensive settlement of the estates of deceased persons, attest the marvellously clear insight of the people of the colonies and young States into the principles involved, and the genuine instinct which guided them in their realization. Necessarily diverse in their details, as the systems of the several States cannot but be, since each State enacts its own Code, there is a common intendment in them all in recognizing the law of administration," including the administration of the

estates of incompetents, "as a distinct and independent branch of jurisdiction, based upon and determined by its own inherent principles. The rich and manifold experiences of a century of unexampled national growth and development have tended to mould these systems in the national spirit common to all the States; as each is the reflex of the nation, so their institutions are rapidly assimilating into a national system; in which the incongruities incidental to the experimental enactments of the several and independent legislatures are gradually disappearing before the light of common experience and intelligent discussion."

This work, also, embodies the experience of many years of active application of the principles discussed therein, and owes its existence to the necessity of acquainting myself with the underlying principles determining the powers and duties, the rights and liabilities of guardians. Painfully aware, as I am, of its short-comings and limitations, I venture to offer the work to the public, in the hope that it may be received in that spirit of kind forbearance of criticism which was extended to my work on Administration; and that it may sometimes be of assistance to judges and practitioners in dealing with the questions, growing daily in frequency and importance, touching this branch of the law.

J. G. WOERNER.

ST. LOUIS, MO.,
March, 1897.

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A TREATISE

ON THE

AMERICAN LAW OF GUARDIANSHIP.

INTRODUCTORY.

CHAPTER I.

PROTECTION EXTENDED BY THE STATE OVER MINORS AND PERSONS OF UNSOUND MIND.

§ 1. **Functions of the State in Respect to Property of Infants and of Persons of Unsound Mind.** — Neither children (known in law, until they have reached majority, as *Infants* or *Minors*) before maturity as individuals, nor idiots (persons wholly destitute of the reasoning power), nor persons of unsound mind (*Non Compos Mentis*, *Insane Persons*, or *Lunatics*, having from any cause lost the use of their reasoning power), possess that quality of will power which constitutes the essential element of property.¹ Hence minors and persons of unsound mind cannot legally dispose of or control their property: the former by reason of a conclusive presumption of law that they are, the latter when adjudged by the proper court to be, incompetent to manage their affairs. It is obvious, therefore, that the dispositive quality of mind lacking in these classes of persons must be supplied from without, to enable them in any

Minors, idiots,
and lunatics
incompetent to
manage their
affairs.

¹ Woerner on American Law of Administration, Intr. §§ 4, 10.

wise to enjoy or be benefited by that which belongs to them.

The law manages their property for them.

And since the enjoyment of property, as well as of life, is the inalienable right of human beings, it is the office of the State in all civilized countries to substitute, in vindication of the property rights of minors and persons of unsound mind, its own universal will¹ for that of the incompetent owners, thus restoring the essential element of their property. This is accomplished by the intervention of officers known as guardians, curators, committees, tutors, conservators, &c.,² controlled by a class of courts having jurisdiction for this purpose, and armed with powers commensurate with their functions, namely, to control, preserve, and dispose of the property of their wards as these themselves, acting rationally, would do if *sui juris*.³ "This court," says Lord Hardwicke (speaking of the High Court of Chancery), "has a general right delegated by the crown as *pater patriæ* to interfere in particular cases, for the benefit of such who are incapable to protect themselves."⁴ The protection of the court is extended to the person, as well as the property, of infants.⁵ "Idiots and lunatics," is the language in the leading case of *Eyre v. Shaftsbury*,⁶ "who are incapable to take care of themselves, are provided for by the king as *parens patriæ*, and there is the same reason to extend this care to infants."⁷

§ 2. Sources of Chancery Jurisdiction over Infants and Persons of Unsound Mind. — At common law the king, as *parens patriæ* and fountain, or rather, as Blackstone puts it, reservoir of justice, is the general protector of all infants, King's authority over minors and lunatics. idiots, and lunatics.⁸ Hence when an infant needed assistance in court, the king issued his letter patent appointing one or more persons to act as guardian.⁹ But the Chancellor, in

¹ The law, which is the rational will of all rational persons: Woerner on Adm. § 4.

² *Ib.*, § 10, note (2). See *post*, § 131, as to the names by which these officers are known.

³ *Ib.*, § 11. Mr. Schouler defines a guardian to be "a person intrusted by law with the interests of another, whose youth, inexperience, mental weakness, and feebleness of will disqualify him from acting for himself in the ordinary affairs of life, and who is hence known as *ward*:"

Schoul. Dom. Rel. § 283. See Eversley's Law of Dom. Rel. 631.

⁴ *Butler v. Freeman*, 1 Amb. 301, 302; *Williamson v. Berry*, 8 How. (U. S.) 495, 555.

⁵ *Aymar v. Roff*, 3 John. Ch. 49.

⁶ 2 P. Wms. 103, 118, citing *Fitzh. N. B.* 232.

⁷ See *Shelford on Lunatics*, 9.

⁸ 3 Bla. 427; *ib.* 47; *Chambers on Infancy*, 2.

⁹ *Fitzh. N. B.* 27 L.

his quality of keeper of the king's conscience, in this respect fully represents the crown, and thus acts as the general guardian of all infants, idiots, and lunatics.¹ As to such infants as were, on the death of a tenant in chivalry, entitled as heirs, making the guardianship over them a matter of profit and advantage,² a statute was passed in the interest of feudal lords creating the Court of Wards, to which the jurisdiction over such wardships was transferred,³ not affecting, however, the supreme prerogative jurisdiction of the crown over the persons and property of infants for their benefit. This, whatever may have been the Chancellor's power before, was delegated to the Court of Chancery⁴ after the abolition of the Court of Wards,⁵ so that now there is no doubt of the existence of the jurisdiction over infants in the English equity courts.⁶

Delegated to the Lord Chancellor.

Court of Wards.

Now in courts of equity.

The English chancery jurisdiction in lunacy differs from that over infants in being derived from the king's warrant, under his sign manual, to the Lord Chancellor,⁷ the king delegating his authority merely to avoid application to him in person.⁸ But the superintendence of the trust,

Chancery jurisdiction in lunacy.

¹ 3 Bla. 47; Simpson on Inf. 146; Cham. Inf. 1 *et seq.*

² Guardianship in Chivalry was, as pointed out by Mr. Hargrave (in note 11 to Co. Litt. 88 *b*, Lond. ed. 1817), an interest for the profit of the guardian, rather than a trust for the benefit of the ward: saleable and transferable like any other subject of property, to the highest bidder, and transmissible to the lord's personal representatives. It entitled the guardian to make sale of his ward's marriage, and the female ward was obliged to marry the person tendered by the guardian, under penalty of forfeiting to him the value of the marriage, that is to say, the amount he might have obtained by the sale to the highest bidder; the male ward refusing the marriage tendered him forfeited double this sum. The guardian was not accountable for the profits of his ward's estate, but kept them for his private emolument, subject only to the bare maintenance of the infant. No wonder that Mr. Hargrave remarks: "This explication of the nature of wardship in chivalry, general as it is, may well excite a strong idea of the

horrid evils necessarily incident to it." See Blackstone's remarks on the statute abolishing wardships and other oppressive feudal servitudes, Vol. 2, p. 77.

³ 12 Hen. VIII. c. 1.

⁴ Cham. Inf. 1, 10; 3 Bla. 426; Cary *v.* Bertie, 2 Vern. 333, 342; Hill *v.* Turner, 1 Atk. 515; Butler *v.* Freeman, 1 Amb. 301, 302.

⁵ By Stat. 12 Car. II. c. 24.

⁶ Cham. Inf. 1 *et seq.* "Why this jurisdiction," says Simpson, in his treatise on Infancy, "should be exercised only by the Court of Chancery, and not by the courts of the common law, is a matter of uncertainty."

⁷ Simps. Inf. 146.

⁸ Buswell on Insanity, § 29. This author remarks that the crown commits the care of lunatics to some great officer, not necessarily to the Chancellor; p. 42, note (1). He also quotes from Lord Campbell's Lives, vol. 1, p. 14: "I clearly apprehend that a commission '*de idiota*,' or '*de lunatico inquirendo*,' would issue at common law from the Court of Chancery under the Great Seal, and that the Lord

when the fact of lunacy is ascertained and a proper custodian of the insane person and of his estate appointed, is a part of the general jurisdiction of the Court of Chancery.¹

§ 3. **Ecclesiastical Jurisdiction over Infants.** — The ecclesiastical courts of England formerly exercised the power of appointing guardians to infants in respect of their personal property,² although Lord Hardwicke emphatically denounced this practice as extra-judicial, unless a suit were pending,³ and Lord Mansfield remarked of a guardian appointed by the Ecclesiastical Court, that the appointment in that court was “for the mere appearance.”⁴

A distinction was observed by the ecclesiastical courts, in the appointment of guardians, between *infants*, a term employed to designate children under seven years of age, and *minors*, including children above seven and under twenty-one.⁵ Minors themselves were allowed to nominate their guardians; but the Ordinary made the appointments for infants without consulting them.⁶

The power of the ecclesiastical courts never extended to the appointment of a guardian over real estate;⁷ the lease of a ward's land made by a guardian of ecclesiastical appointment was, as a matter of course, treated as being void.⁸ But where a ward had both real and personal estate, the appointment of a guardian by the spiritual court was held good as to the personal estate.⁹

The appointment of an administrator *durante minore ætate*, incumbent upon the Ecclesiastical Court before the transfer of its testamentary functions upon the Probate Court,¹⁰ in cases where a sole executor or person entitled to the administration is a minor, operated to some ex-

Chancellor, without any special delegation for this purpose, would have authority to control the execution of it, and to make orders for that purpose.” And he adds, that the Lord admits that according to the common opinion the Chancellor's authority in lunacy is derived solely from the warrant; and that his views, as above expressed, do not appear to be supported by authorities: p. 41, note (3).

¹ Busw. Ins. § 47.

² Cham. Inf. 72, with authorities: Munro v. Forrest, 3 Cr. C. C. 147, 156, 157.

³ Thus limiting the power to the appointment of a guardian *ad litem*: Buck v. Draper, 3 Atk. 631.

⁴ Rex v. Delaval, 3 Burr. 1434, 1436.

⁵ Simps. Inf. 238; 3 Redf. on Wills, *438, note (9), citing Toller's Ex. 100.

⁶ Cham. Inf. 73, and authorities.

⁷ Simps. Inf. 237.

⁸ Esron v. Nicholas, 1 De G. & S. 118, 120.

⁹ Carlisle v. Wells, 2 Lev. 162, 163.

¹⁰ Ellersley, Dom. Rel. 653.

tent like the appointment of a guardian, because the court was not bound to appoint as administrator the minor's guardian, if he already had one, but might, in its sound discretion, select any other person.¹ At common law the administration *durante minore ætate* lasts until the infant executor or administrator has reached the age at which he can legally qualify,² now fixed by statute at twenty-one years.³ If administration had been granted during the minority of several, it determined upon the majority of any one of them;⁴ but where one of several died, the administration *durante minore ætate* was not thereby terminated.⁵

Termination of
the administra-
tion *durante*
minore ætate.

¹ Woerner on Adm. § 182; Perkins' Wms. Ex. [481]; Goods of Weir, 2 Sw. & Tr. 451.

² Wms. Ex. [484, 485].

³ 38 Geo. III. c. 87, § 6; 58 Geo. III. c. 81, §§ 1, 2.

⁴ Wms. Ex. [485] and authorities.

⁵ Jones v. Strafford, 3 P. Wms. 79, 89, contrary to a former decision.

PART FIRST.

OF THE GUARDIANSHIP OVER MINORS.

TITLE FIRST.

OF THE INSTITUTION OF GUARDIANSHIP OVER MINORS.

CHAPTER II.

OF THE LEGAL RELATIONS BETWEEN PARENT AND CHILD.

§ 4. **The Status of Infancy or Minority.**—In the popular consciousness the term infant is applied to persons of tender age, whose condition of physical and mental helplessness appeals to humanity, both collectively and individually, for that fostering care and protection without which they must perish. To the immediate progenitors, the affection and tenderness for their offspring implanted by the Creator is generally a more powerful motive in affording this protection than any rules of municipal law or statutory enactments can be. A mother's love, indeed, is often proved to be stronger than the instinct of self-preservation, thus attesting the divine source of the law which subordinates the life of the individual to the preservation of the species. But should a man so far lack this common trait of humanity as to neglect or expose his offspring, the law of every civilized State interferes to compel so unnatural a father to nourish, protect, and educate his child.¹ If the father be dead or unable, courts will appoint a guardian to take the father's place, to preserve and administer

Infancy in the popular sense.

Legal protection to infants.

¹ 1 Bla. 447 *et seq.* See, as to a father's or mother's duty in the maintenance of children, *post*, §§ 7, 8.

the ward's property, applying it, under the controlling superintendence of the court, to his maintenance and education until he reach majority.

The common law recognizes as infants all persons who have not attained the age of twenty-one years.¹ The term minors is, for most purposes, co-extensive with that of infants, because it is descriptive of persons of *less* than full age, and therefore applies to all infants.² In some of the American States neither of these terms is applicable to females above eighteen years and under twenty-one, because, as will appear later on, females attain their majority at the age of eighteen.³

The protection extended by the law to infants is conditioned by the recognition of their inability to exercise free will, one of the consequences of which is, obviously, that they are not amenable to punishment for acts which in an adult would constitute a violation of law. Hence, all infants under the age of seven years are conclusively presumed to be incapable of committing crime.⁴ But with the growth and development of the body, the mind and intellect of the young constantly expand and augment in strength during the period of infancy or minority. The transition from the total incapacity of the newly born child to the full intellectual vigor of the adult is gradual. Hence, it is necessary to distinguish between these extremes;⁵ and this necessity has led to the common law rule that infants above seven but under fourteen years of age are *prima facie* presumed incapable of crime, but the presumption of incapacity may be rebutted by evidence; according to the maxim, as stated by Blackstone, *malitia supplet ætatem*.⁶ The evidence to prove the intellectual capacity of such infant must, however, be strong and pregnant, especially if the child be in the beginning of the second period of seven years;⁷ and the criminal capacity must be proved

Legal period
of infancy.

Infants not
punishable by
law.

Prima facie
incapability to
commit crime
may be re-
butted.

¹ Evers. Dom. Rel. 784; Cham. Inf. 13.

² But, as appears from the preceding section, the English ecclesiastical courts distinguished between *infants*, or persons under seven years of age, and *minors*, so called when above seven and until they are twenty-one years of age.

³ *Post*, § 6.

⁴ "Under seven years of age an infant cannot be guilty of felony, for then a felo-

nious discretion is almost an impossibility in nature:" Nagle v. Alleghany Valley Railroad Co., 88 Pa. St. 35, 39.

⁵ Evers. Dom. Rel. 785.

⁶ 1 Bla. 465.

⁷ Per Kirkpatrick, C. J., in *State v. Aaron*, 4 N. J. L. 231, 238, quoting Sir Matthew Hale's words: "Especially if the accused be under twelve years of age." See also opinion of Southard, J.,

as a distinct fact;¹ but it has been held that the evidence of malice, which is to supply age, may be found from the facts of the offence itself.² The infant's confession of the crime is held, in England, not sufficient, "without anxious circumspection," to convict;³ but in America the confession of a boy of twelve years and five months was received, on the ground that the capacity to commit crime presupposes the capacity to confess it.⁴ And so persons above fourteen are presumed to be capable of crime; yet proof may be made to the contrary.⁵

The common law presumption that a boy under fourteen is incapable to commit the crime of rape, rests upon the ground of physical impotence and not upon want of discretion;⁶ and it has been held that such a boy may be indicted for and convicted of an assault with intent to commit rape.⁷

But the chief means employed by the law for the effectual protection of infants against mischievous consequences of their own imprudence or the sinister designs of malevolently disposed persons with whom they may be thrown into contact, is the simple enforcement of the principle involved in the presumption that infants are incapable of binding themselves by contract, except for necessities, and in respect to such acts to which the law may authorize them. Much speculation and argument has been devoted, by text-writers, as well as by judges, to the question, what acts of an infant are voidable, and what void. The details of this subject lie beyond the scope of the present work;⁸

ib. p. 245; *Law v. Commonwealth*, 75 Va. 885, 887; *Parker v. State*, 20 Tex. App. 451, 454; *State v. Adams*, 76 Mo. 355, re-affirmed in *State v. Tice*, 90 Mo. 112.

¹ *Commonwealth v. Mead*, 10 Allen, 398; *State v. Fowler*, 52 Iowa, 103, 106.

² *State v. Toney*, 15 S. C. 409, 414; *Carr v. State*, 24 Tex. App. 562, 568.

³ *Tyler, Inf.* 189; *English, C. J.*, in *Dove v. State*, 37 Ark. 261, 264. See 4 Bla. 22 *et seq.*

⁴ *State v. Guild*, 10 N. J. L. 163, 189. The boy was, on his confession, convicted of murder and executed.

⁵ *State v. Learnard*, 41 Vt. 585, 589.

⁶ Per Read, J., in *Williams v. State*, 14 Ohio, 222.

⁷ "A minor," says the judge, rendering the opinion of the court (*Parker, C. J.*, dissenting) in *Commonwealth v. Green*, 2 Pickering, 380, 381, "of fourteen years of age, or just under, is capable of that kind of force which constitutes an essential ingredient of the crime of rape, and may make an assault with intent to commit that crime, although by an artificial rule he is not punishable for the crime itself."

⁸ Among the many treatises and commentaries discussing this subject may be mentioned *Tyler on Infancy and Coverture*, *Simpson on Infancy*, *Schouler's Do-*

it is deemed sufficient to state that the views of authors and courts seem to settle down to the simple recognition of the natural consequences attending the doctrine that infants lack the power to contract.¹ From this it results that while the infant is never bound (except for the reasonable value of necessities and as to acts recognized by the law),² the adult, not being under disability, and voluntarily contracting with an infant, is always bound if the contract be beneficial to the infant. Whether a contract is beneficial to the infant or not can be determined only by the infant on reaching majority, and in the last instance, or whenever, even at an earlier period, an issue involving this question arises, by a court having jurisdiction to decide such issue.³ An executory contract of an infant is not binding unless confirmed by him after majority, while an executed contract is binding until it is avoided.⁴ It is held, that any declarations or acts by the infant after attaining majority, that clearly recognize the existence of the contract as a binding obligation, will constitute a ratification, although at the time of the declaration made, or the act done, the infant did not know that he had a right to avoid the contract;⁵ although "there is a strong array of authorities in favor of the severer and more exacting rule," to wit, that an infant's contract imposes no liability upon him until ratified after full age, and such ratification must have all the elements of a new contract, except a new consideration.⁶ But an

Infants are never bound except for necessities.

Adults are always bound at infant's choice

mestic Relations, Brigham on Infancy and Coverture, Eversley on Domestic Relations, Chambers on Infancy, Story on Contracts, Kent's Commentaries, &c.

¹ If a minor enter into a special contract to do certain work, he may avoid such contract and may recover a reasonable compensation for the work done, — the damage resulting from the avoiding of his contract being taken into consideration and allowed: *Lowe v. Sinklear*, 27 Mo. 308; followed in *Thompson v. Marshall*, 50 Mo. App. 145, 148.

² Such acts as the law would compel, and acts done in a representative capacity, such as holding office requiring only skill and diligence, executing a mere power, acting as attorney for another, and the like. See *infra*, as to the capacity of infants at common law to do certain acts.

See also *Horstmeyer v. Connors*, 56 Mo. App. 115, 118, and authorities.

³ Bennett's note to *Bingh. Inf.* 11, note (2); *Schoul. Dom. Rel.* § 403 *et seq.*; *Eaton, Jr.*, note to 4th ed. *Reeve's Dom. Rel.* 314; *Field's Law of Inf. &c.*, § 8; *Simps. Inf.* 5; *Tyler, Inf. & Cov.* § 8 *et seq.*; *Evers. Dom. Rel.* 794, with numerous cases cited by each of these authors. Also *Neal v. Berry*, 86 Me. 193; *Hill v. Taylor*, 125 Mo. 331, 343; *Karcher v. Green*, 8 *Houst.* 163.

⁴ *Savage v. Lichlyter*, 59 Ark. 1, 4, and authorities cited.

⁵ *American Mfg. Co. v. Wright*, 101 Ala. 658, qualifying earlier Alabama cases.

⁶ *American Mfg. Co. v. Wright*, *supra*, citing authorities.

infant's deed conveying his lands without any or on a mere nominal consideration has been held void absolutely.¹ It should be noticed, however, that executory contracts, and contracts executed by the delivery of any article of personal property, may be rescinded by the infant either before or after reaching majority;² while the conveyance of real estate cannot be avoided until the infant has attained full age.³

§ 5. **What Constitutes Necessaries.** — It is not easy to define by a general rule what constitutes necessaries for which an infant may bind himself. “It is a flexible, not an absolute term,” says Thomas, J., in *Breed v. Judd*,⁴ “having relation to the infant's condition in life, to the habits and pursuits of the place at which, and the people among whom he lives, and to the changes in those habits and pursuits occurring in the progress of society.” “The question is a mixed one of law and of fact,” says Ragan, C., in *Cobbey v. Buchanan*,⁵ “to be determined in each case from the particular facts and circumstances.”⁶ The common law, it is held, defines necessaries to consist only of necessary food, drink, clothing, washing, physic, instruction, and a competent place of residence;⁷ including necessaries for his family,⁸ and for nursing his lawful child.⁹ Regimentals sold to an infant;¹⁰ tailor-made clothes for a young man of twenty about to be married, instead of home-made clothing furnished by the mother;¹¹ tools necessary to carry on the business in which the minor is employed by consent of his guardian;¹² a board bill contracted by an infant to enable him to attend school;¹³ a good common-school education;¹⁴ services of

When infant
may rescind
contract.

Rule defining
necessaries is
not absolute.

The question is
a mixed one of
law and fact.

Necessaries at
common law.

¹ *Robinson v. Coulter*, 6 Pickle, 705.

² *Betts v. Carroll*, 6 Mo. App. 518, 520.

³ *Reeve's Dom. Rel.* 320, and authorities; *Baker v. Kennett*, 54 Mo. 82, 88; *Singer Co. v. Lamb*, 81 Mo. 221, 225; *Marlin v. Kosmyroski*, 27 S. W. (Tex.) 1042.

⁴ 1 Gray, 455, 458.

⁵ 67 N. W. Rep. 176, 178.

⁶ *Engelbert v. Troxell*, 40 Neb. 195, 205.

⁷ *Shelton v. Pendleton*, 18 Conn. 417, 423, citing for authority *Whitingham v. Hill*, Cro. Jac. 494.

⁸ *Price v. Sanders*, 60 Ind. 310, 314; *Beeler v. Young*, 1 Bibb, 519, 520; *Chapman v. Hughes*, 61 Miss. 339, 347; *Freeman v. Bridger*, 4 Jones, L. 1, 3.

⁹ *Beeler v. Young*, *supra*.

¹⁰ *Coates v. Wilson*, 5 Esp. 152: Lord Ellenborough said that “in these perilous times, when young men had enrolled themselves for the defence of the country, he should hold that clothes, so furnished, were necessaries.”

¹¹ *Rundel v. Keeler*, 7 Watts, 237, 239; *Sams v. Stockton*, 14 B. Mon. 232, 234.

¹² *Rundel v. Keeler*, 7 Watts, 237; *Davis v. Caldwell*, 12 Cush. 512; *Mohney v. Evans*, 51 Pa. St. 80, 83; *Breed v. Judd*, 1 Gray, 455.

¹³ *Kilgore v. Rich*, 83 Me. 305.

¹⁴ *Middlebury College v. Chandler*, 16 Vt. 683, 686.

an attorney in defending an infant in a bastardy proceeding,¹ or in prosecuting an action for damages for seduction and breach of promise to marry, in behalf of an infant in destitute circumstances;² filling decaying teeth,³ have all been held necessities in the sense of binding a minor contracting for or benefited by the same, and rendering his estate liable for the reasonable value thereof; the *onus* of proving actual necessity being, of course, upon the party asserting such liability.⁴

Onus to prove what are necessities on party asserting minor's liability.

An infant is not generally bound for counsel fees as necessities; but where there is no guardian, the infant's estate is held liable for the fees of counsel whose services contributed to secure it.⁵ In Vermont, it is held that a law-suit may be necessary for a minor;⁶ and in Texas an attorney is entitled to his reasonable compensation for instituting a suit in behalf of an infant at the request of a next friend, and recovering for him money or property, on the ground that a refusal of such claim would establish a rule which would operate to the prejudice of the class which it is designed to protect.⁷

Counsel fees may be necessities.

On the other hand, matters which pertain only to the preservation, protection, or security of the infant's property are generally excluded from the class of necessities in this sense, however beneficial they may be; whatever relates to the property, is the legitimate business of a guardian, and if transacted by the infant may be avoided at his election.⁸ Hence, an infant is not bound for legal services rendered at the request of his guardian, to protect the title to his estate, but only the guardian.⁹ Nor is the minor liable for the fees of a guardian *ad litem*.¹⁰ The board of horses, though used in the minor's business of a hackman, and occasionally to carry his family out to ride, cannot be held to be within the class of necessities for which an infant is to be held

Protection of minor's property not classed among necessities.

Neither attorney's fees for services in protecting ward's title to real estate,

nor board of horses used in ward's business.

¹ Barker v. Hibbard, 54 N. H. 539.

² Munson v. Washband, 31 Conn. 303.

³ Strong v. Foote, 42 Conn. 203, 205.

⁴ Johnson v. Lines, 6 Watts & S. 80, 82.

⁵ Epperson v. Nugent, 57 Miss. 45, 47.

⁶ Thrall v. Wright, 38 Vt. 494.

⁷ Searcy v. Hunter, 81 Tex. 644, 647.

⁸ N. H. Fire Ins. Co. v. Noyes, 32 N. H. 345, 351.

⁹ Phelps v. Worcester, 11 N. H. 51, 53; Englebert v. Troxell, 40 Neb. 195.

¹⁰ Englebert v. Troxell, 40 Neb. 195, 204.

Nor horses. And the like. Though a riding horse may be necessary. Contract to insure minor's property against fire not binding. Watch and chain held not necessary. Common-school education is necessary, but not college education. Money paid for a minor not necessary if there be a guardian.

liable.¹ Nor is a horse necessary, in the technical sense, to a minor, who uses him in the cultivation of land.² Courts have generally excluded from the term "necessaries" horses, saddles, bridles, pistols, liquors, fiddles, chronometers, &c.;³ but the rule that a riding-horse may not be regarded as necessary for a minor, is not inflexible.⁴ A contract for the insurance of a minor's property against loss or damage by fire has been held not to bind the minor on the ground that it was necessary.⁵ So an infant does not make himself liable for the expense of repairing his dwelling-house contracted for by him, although such repairs were necessary for the prevention of immediate and serious injury to the house;⁶ nor for materials furnished to enable him to build a dwelling-house on his land;⁷ nor is a minor's property subject to a mechanic's lien.⁸ Whether a watch and chain is necessary to an infant of eighteen was referred by the judge to a jury, and by them negatived.⁹ While a common-school education is, a college education is not, ranked among those necessities for which a minor may render himself liable.¹⁰ Even though the money to defray the expenses of a minor's trip abroad was expended for her benefit, and the trip was prudent and proper, yet if the guardian furnishes means suitable to her age and estate, a third party has no right to interfere, and cannot recover money so expended without the guardian's consent.¹¹ Money paid at a minor's request to relieve him from draft for military duty is not recoverable against a plea of infancy.¹²

An infant is only liable for necessities, when he has no other means of obtaining them than pledging his personal credit. If

¹ *Merriam v. Cunningham*, 11 Cush. 40, 44.

² *Grace v. Hale*, 2 Humph. 27, 30; *Rainwater v. Durham*, 2 Nott. & McC. 524 (decided by a divided court).

³ *McKanna v. Merry*, 61 Ill. 177, 179.

⁴ *Owens v. Walker*, 2 Strobb. Eq. 289, 296; *McKanna v. Merry*, 61 Ill. 177, 179.

⁵ *N. H. Fire Ins. Co. v. Noyes*, 32 N. H. 345, 350.

⁶ *Tupper v. Cadwell*, 12 Met. (Mass.) 559, 563; *West v. Gregg*, 1 Grant, 53;

Wallis v. Bardwell, 126 Mass. 366; *Phillips v. Lloyd*, 18 R. I. 99; *Horstmeyer v. Connors*, 56 Mo. App. 115.

⁷ *Freeman v. Bridger*, 4 Jones, L. 1; *Allen v. Lardner*, 78 Hun, 603.

⁸ *Bloomer v. Nolan*, 36 Neb. 51, 55.

⁹ *Welch v. Olmstead*, 90 Mich. 492.

¹⁰ *Middlebury College v. Chandler*, 16 Vt. 683, 685.

¹¹ *McKanna v. Merry*, 61 Ill. 177, 180.

¹² *Dorrell v. Hastings*, 28 Ind. 478.

he is under the care of a parent or guardian who has the means and is willing to furnish what is actually necessary, he cannot, without the consent of such parent or guardian, bind himself for articles which, under other circumstances, might be deemed necessities. The person dealing with an infant is bound, at his peril, to inquire whether he is in a situation to bind himself for necessities;¹ and where an infant lives with his parent or guardian, it will be presumed that he is properly maintained;² and the father's poverty is not a sufficient ground to make the infant liable.³ But with the reason of this rule, the rule itself ceases; if a minor cannot safely live with his father, and elopes for fear of personal violence and abuse, the father is liable for necessary support and education furnished to such child by a stranger.⁴

Minor having a parent or guardian cannot bind himself without their consent.

But otherwise if the minor has been driven from home.

The better authority at common law negatives the liability of an infant for money directly lent to him, though expended in the purchase of necessities;⁵ but in equity the lender of the money may be subrogated to the rights of the seller of the goods, even against the infant;⁶ and it is held questionable whether courts might not to some extent consider money necessary for a minor.⁷

Minor is not liable at law for money loaned him.

But in equity liability may be enforced.

Whether articles furnished an infant belong to a class for which he is bound to pay, is held to be a matter of law to be judged by the court; but, being of such class, then whether they were necessary and suitable to the condition and estate of the infant, and of reasonable prices, must be left to the jury.⁸

Judge determines what class of articles are necessities; but whether suitable and reasonable, is determined by the jury.

But the law does not protect infants from liability, in a civil action, for damages occasioned by their tortious acts. Lord Mansfield says,⁹ that "the privilege of infants is given as a *shield*, and not as a *sword*," from which he

Infants liable for tortious acts.

¹ Kline v. L'Amoureux, 2 Paige, 419; Guthrie v. Murphy, 4 Watts, 80; Freeman v. Bridger, 4 Jones, L. 1. v. Coburn, 7 N. H. 368; Kilgore v. Rich, 83 Me. 305.

² Connolly v. Hull, 3 McCord, L. 6, 8; Wailing v. Toll, 9 Johns. 141; Phelps v. Worcester, 11 N. H. 51, 53.

³ Hoyt v. Casey, 114 Mass. 397.

⁴ Stanton v. Willson, 3 Day, 37, 56.

⁵ Bent v. Manning, 10 Vt. 225, 229.

⁶ Marlow v. Pitfield, 1 Pere Wms. 558; Price v. Sanders, 60 Ind. 310, 315; Conn

⁷ Bent v. Manning, *supra*.

⁸ Beeler v. Young, 1 Bibb, 519; Merriam v. Cunningham, 11 Cush. 40, 44; Glover v. Ott, 1 McCord, L. 572; Englebert v. Troxell, 40 Neb. 195; McKanna v. Merry, 61 Ill. 177; Johnson v. Lines, 6 Watts & S. 80, 84; Tupper v. Cadwell, 12 Met. (Mass.) 559, 563.

⁹ Zouch v. Parsons, 3 Burr. 1794, 1802.

deduces the rule, "That it never shall be turned into an offensive weapon of *fraud* and *injustice*." It seems that this statement ought to be understood as subject to the same distinction which is made, as above stated, in respect to the *doli capax* and *doli incapax* of infants in criminal cases; for it would be inconsistent to hold an infant responsible for an act in a civil, and not responsible for the same act in a criminal proceeding, on the ground that the infant, not having discretion, cannot commit wrong.¹ But in cases of tort committed by force, the liability of infants is ascribed to the principle that in case of civil injuries with force the intention is not regarded,² so that, in such cases, the doctrine holds good that an infant is liable for a tort in the same manner as an adult.³ The current of decisions in America is now undoubtedly to the effect that infancy is no defence to an

Liability for
fraudulent rep-
resentation of
full age.

action for obtaining loans or property upon the fraudulent representation of majority, disavowing earlier English and American cases to the contrary.⁴ But the fraud must be clearly distinguishable from the contract; the recovery must be upon a cause of action *ex delicto*, without giving effect to the contract, although the fraud may be connected with it.⁵

Other acts, besides contracts for necessities, are recognized by the law as binding upon infants, depending for their validity upon age and sex of the infant. Thus, according to Blackstone,⁶ a female may be betrothed or given in marriage at the age of seven years; is entitled to dower at nine; may consent or disagree to marriage, and also, under a rule introduced by the ecclesiastical courts, bequeath personal property at twelve;⁷ choose a guardian at fourteen; be executrix at seventeen; and is of full age at twenty-one. A male, on the other hand, may take the oath of allegiance at the age of twelve years; consent or disagree to marriage, choose a guardian, and bequeath

¹ Reeve's Dom. Rel. 325. See also Schoul. Dom. Rel. § 426. — An infant unable to distinguish right from wrong can hardly be said to commit a tort.

² Tyler, Inf. § 123, citing a number of cases in which the infants were held liable without reference to the question of intention; Reeve's Dom. Rel. 324.

³ Conway v. Reed, 66 Mo. 346, 350.

⁴ Tyler, Inf. § 126; Rice v. Boyer, 108 Ind. 472, 475.

⁵ Note by Eaton, Jr., to Reeve's Dom. Rel. 325; 2 Kent, 241.

⁶ 1 Bla. 463.

⁷ By 1 Vict. c. 26, no person under the age of twenty-one years can now will real or personal property.

personal property at fourteen ; be executor at seventeen, and is of full age at twenty-one.

§ 6. **Termination of the Status of Infancy.** — It is obviously impossible to ascertain the precise age at which an individual ripens into that maturity of intellect which the law deems necessary to authorize him to act *sui juris*. Were it practicable, this age would be found to vary greatly

Necessity of fixing age of majority by law.

in different individuals : some would need the fostering care and protection which the law accords to infants at an age when others possess sufficient intellectual vigor to be safely left to take care of themselves. But it is indispensably necessary that the individuals themselves, as well as those who deal with them, should know upon what footing they stand to each other ; and this can only be accomplished by a positive law fixing *some* age at which the legal status of infancy shall be conclusively presumed to cease, and that of the mature individual to ensue. Different nations and different States of the same nation have reached different conclusions as to the legal age of majority which shall most nearly coincide with the natural maturity of individuals. Thus the Roman law fixes the completion of the twenty-fifth year as the *major ætas* (majority);¹ which, in respect to males, is followed by Spain and Holland.² The common law of Eng-

Age of majority at common law.

land fixes the age of twenty-one years for both sexes as the period of majority, which is followed in all the States of the Union as to males ; but females are declared to be of full age at eighteen by the statutes of Arkansas,³ California,⁴ Colorado,⁵ Dakota,⁶ Idaho,⁷ Illinois,⁸ Iowa,⁹ Kansas,¹⁰ Maryland,¹¹ Minnesota,¹² Missouri,¹³ Nebraska,¹⁴ Nevada,¹⁵ Ohio,¹⁶ Oregon,¹⁷ Vermont,¹⁸ and Washington.¹⁹ In the

States declaring females of age at eighteen.

¹ But infants, having arrived at the age of puberty, had power to bind themselves in various ways ; and minors could attain the legal standing of full aged persons by imperial grant : Salkowski's Inst. § 60 ; 2 Kent, 233.

² 2 Kent, 233. Kent adds that by the French Civil Code the age of full capacity is twenty-one years, except that twenty-five years is the majority for contracting marriage without paternal consent by the male, and twenty-one by the female, citing Code Civil, §§ 145, 488.

³ Dig. 1884, § 3464.

⁴ Civ. Code, 1885, § 25.

⁵ Jackson v. Allen, 4 Col. 263, 269.

⁶ Civ. Code, 1887, § 2509.

⁷ Rev. St. 1887, § 2405.

⁸ St. & Curt. St. ch. 64, ¶ 1. See, for a construction of this statute, Stevenson v. Westfall, 18 Ill. 209.

⁹ Code, 1888, § 3428.

¹⁰ Gen. St. 1889, § 3868.

¹¹ 2 Md. Code, 1888, Art. 93, pl. 192.

¹² Gen. St. 1891, § 5741.

¹³ Rev. St. 1889, § 5278.

¹⁴ Comp. St. 1891, ch. 34, § 1.

¹⁵ Gen. St. 1885, § 4943.

¹⁶ Rev. St. 1890, § 3136.

¹⁷ 2 Hill's Ann. St. 1887, § 2951.

¹⁸ Rev. L. 1894, § 2736.

¹⁹ 2 Code, 1891, § 1134.

In other States both sexes of age at twenty-one. other States, either by express provision of statute, or in the absence of statutory provision by the common law, both sexes attain majority at the age of twenty-one years. In a number of States the marriage of a female infant to a male adult,¹ or the simple marriage of a female, terminates the status of infancy, or merges it in that of a feme covert,² and in Utah,³ as well as in the States of Iowa,⁴ Louisiana,⁵ and Texas,⁶ males as well as females are emancipated or attain the status of majority by marriage. In cases of females, marriage necessarily terminates the father's right to the custody and services of the infant, without express statutory provision.⁷

The subject of emancipation is of little practical importance in the United States. In the Roman law great changes were wrought in the privileges and liabilities of a child by its emancipation, the effect of which is still largely predominant in Louisiana. In England the chief significance of emancipation was to test whether a child had or had not acquired a settlement in a parish, so as to cast the burden of a pauper's support upon it.⁸ The same question has arisen in some of the States, and thus given prominence to the effect of emancipation upon the status of an infant in determining the liability of contending parishes for his or her support.⁹ The most important consequence of emancipation in this country is that it may give the infant a right to his own earnings, which otherwise belong to the father or mother.¹⁰ Hence, if a father has relinquished all right to the earnings of his minor son, property purchased therewith by the son is not liable for the father's debts;¹¹ but until

¹ As in Washington : Code, 1891, § 1134.

² For instance in Maryland, Nebraska (if over sixteen : Comp. St. 1891, ch. 34, § 1), Oregon and Texas.

³ Comp. L. 1888, § 2560.

⁴ Code, 1888, § 3428.

⁵ Saund. Voorh. C. C. 1889, art. 379.

⁶ Rev. St. 1879, § 4857. Prior to 1848, a female infant was not fully emancipated by her marriage : Burr v. Wilson, 18 Tex. 367.

⁷ Aldrich v. Bennett, 63 N. H. 415.

⁸ Evers. Dom. Rel. pt. II. ch. 4, p. 590.

⁹ Sherburne v. Hartland, 37 Vt. 528; Northfield v. Brookfield, 50 Vt. 62, 65;

Calais v. Marshfield, 30 Me. 511, 522, citing earlier Massachusetts cases : Tremont v. Mount Desert, 36 Me. 390; Orneville v. Glenburn, 70 Me. 353. Emancipation may be inferred from proof that one has become of full age : Baldwin v. Worcester, 66 Vt. 54.

¹⁰ See Tyler on Inf. § 137. After emancipation, a minor may recover the wages for his work against his father as well as against strangers : Wright v. Dean, 79 Ind. 407; Nightingale v. Worthington, 15 Mass. 261, 263.

¹¹ Furrh v. McKnight, 6 Tex. Civ. R. 583.

some act of emancipation be shown, the minor's property is liable to his father's creditors.¹ Marriage of the minor son, with² or without³ the father's consent, emancipates him, and there is little doubt that when an infant daughter marries she is thereby emancipated from parental control.⁴

Emancipation does not, in the United States, enlarge or affect the minor's capacity to make a contract, except as it releases him from his father's control in the matter of his earnings.⁵

Power conferred upon courts to remove the disability of minors constitutes a special power, not exercised in the course of the common law; and where the record fails to show the facts necessary to invest the court with jurisdiction, its order removing the minor's disabilities is void.⁶

Statutes authorizing courts to remove disabilities of minors are strictly construed.

By the common law the ordinary rule of computing time is departed from in determining the date of an infant's majority. The rule is that the infant attains full age on the last day of the year completing the period of infancy; and since the law recognizes no fraction of a day, it results that both the day of the birth and of the anniversary are reckoned in full, thus shortening the period of infancy by one day.⁷ The rule has been followed in some of the States;⁸ but it was strongly condemned by Redfield in his work on Wills,⁹ and abolished by statute in California¹⁰ and Dakota,¹¹ enacting that the period of minority is to be computed from the first min-

Computing date of majority.

¹ *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179, 183.

² *Commonwealth v. Graham*, 157 Mass. 73, 75.

³ *Commonwealth v. Graham*, *supra*; *Sherburne v. Hartland*, 37 Vt. 528, 529. But in Maine it was held that the son's marriage without the father's consent does not emancipate him: *White v. Henry*, 24 Me. 531, 533.

⁴ *Aldrich v. Bennett*, 63 N. H. 415; *Burr v. Wilson*, 18 Tex. 367, 370 (under the Spanish law).

⁵ *Taunton v. Plymouth*, 15 Mass. 203; *Person v. Chase*, 37 Vt. 647, 649; *Hoskins v. White*, 13 Mont. 70, 76.

⁶ *Hindman v. O'Connor*, 54 Ark. 627, 642.

⁷ Under this rule a person may become of age within a fraction of an hour less

than forty-eight hours before he has completed his twenty-first year, as appears from the anonymous case reported in 1 Salk. 44. See remarks of Holt, C. J., in *Howard's Case*, 2 Salk. 625.

⁸ *State v. Clarke*, 3 Harr. (Del.) 557, 558; *Hamlin v. Stevenson*, 4 Dana, 597; *Wells v. Wells*, 6 Ind. 447.

⁹ 1 Redf. on W. 20 *et seq.* After citing *Swinburne*, *Blackstone*, *Kent*, *Bingham*, and *Metcalf* as so laying down the rule, he emphatically dissents therefrom, remarking that it is to be deemed "scarcely less than a blunder, which for the good sense of the thing" he wished to see set right.

¹⁰ *Ganahl v. Soher*, 5 Pac. R. 80; C. C. 1885, § 25.

¹¹ C. C. 1887, § 2509.

ute of the day of birth to the first minute of the day completing the period.¹

§ 7. **The Right of Parents to the Custody of their Children.** — The father, and second to him the mother, is the natural guardian of the child, — not only in the feudal sense, applicable primarily to the father of an heir apparent, whose guardianship terminated when the heir attained the age of fourteen, but in the natural and popular sense, which ascribes to the father the duty and right to *guard*, maintain, and educate his child during its infancy.² Eversley points out³ that the relationship of parent and child is a strong and powerful tie, the proper regard for, and sanctity of which is necessary for the cohesion of States as well as of families. “It is a natural instinct,” he says, “which impels those who have brought children into the world to shield, nourish, and support them till their early weakness has changed into mature strength.”⁴ In recognition of this law of nature, the common law of England and numerous English and American statutes designate the father as the guardian of his children, bound on the one hand to maintain, protect, and educate them,⁵ and entitled, on the other hand, to their custody and control during their infancy.⁶

It does not lie within the scope of this treatise to discuss the disabilities and rights of infants, further than may be necessary to point out the powers and liabilities of guardians in so far as they are amenable to the law. It is considered sufficient, therefore, to mention, in this connection, the rights and duties of the father and mother between each other, and between them and a statutory guardian, and incidentally between them and strangers.

The father is entitled to the custody of his infant child,⁷ even

¹ So that a male born on the 11th day of April is of full age on the 11th day of April twenty-one years thereafter: *Ganahl v. Soper, supra*.

² Evers. Dom. Rel. pt. II. ch. 1, p. 534.

³ *Ib.*, pt. II. ch. 1, § 1.

⁴ Blackstone (book 1, p. 447), quotes from Montesquieu (*Spirit of Law*, book 23, ch. 2), to show that the establishment of marriage in all civilized States is built on this natural obligation of the father to provide for his children; “for that ascertains and makes known the person who is bound to fulfil this obligation; whereas, in promiscuous and illicit conjunctions,

the father is unknown.” See remarks of Kent in Lect. XXIX. 2 Comm. 189 *et seq.*

⁵ 1 Bla. 446.

⁶ The power of a father under the ancient Roman law included the right to sell or kill his children, and ended only with their death or emancipation; but the atrocity of this law caused it to fall into disuse, and it was looked upon, says Kent, as obsolete when the Pandects were compiled. The Emperor Constantine made the killing of an adult son a capital crime: 2 Kent, 203. See note (3) p. 6, § 7, of Woerner on Adm.

⁷ *Matter of Scarritt*, 76 Mo. 565, 582;

against its mother,¹ unless its tender age requires the fostering care of the mother, if she be proved to be worthy and qualified.² This right of custody extends to one adopting a child, against all but its natural parents; and even against them if they make themselves parties to the contract of adoption;³ but by the common law a father cannot irrevocably divest himself of his right and duty to the custody and charge of his child, on the ground of public policy,⁴ and this principle has been held to affect the construction of a contract.⁵ A verbal agreement by a father placing his child in the custody of another during her minority, does not estop him from reclaiming that custody,⁶ unless the relation between the child and the person to whom it was committed has been of such duration and character that the happiness of the child would suffer by severing it.⁷ The father may, by a contract made in conformity with the law, in terms "clear, definite, and certain," relinquish his right to the custody of his child to a third person;⁸ in such case the subsequent appointment of a statutory guardian does not avoid the right of the person or institution to whom the custody of the child was committed;⁹ but he cannot transfer the custody of the person of his child, not adjudged to be a proper subject by due course of law, to a penal institution;¹⁰ a statute

Right of the father to the custody of his child; when against the mother.

Right of father by adoption.

Verbal contract to place child in another's custody does not estop a father from reclaiming it,

but he may by lawful contract relinquish it.

State v. Banks, 25 Ind. 495, 500; *State v. Richardson*, 40 N. H. 272; *McGlennan v. Margouski*, 90 Ind. 150, 155; *Brooke v. Logan*, 112 Ind. 183, 185.

¹ *People v. Mercein*, 3 Hill (N. Y.), 399, 421, 423; *Johnson v. Terry*, 34 Conn. 259, 263; *People v. Chegaray*, 18 Wend. 637, 642; *State v. Barney*, 14 R. I. 62.

² *State v. Paine*, 4 Humph. 523, 536; *Commonwealth v. Smith*, 1 Brewst. 547, 549; *State v. Kirkpatrick*, 54 Iowa, 373; *Commonwealth v. Hart*, 14 Phila. 352. In New Jersey a statute gives the custody of infants under seven years to the mother, if she be not unfit: *State v. Baird*, 18 N. J. Eq. 194, 198, which statute is held to be constitutional: *Bennett v. Bennett*, 13 N. J. Eq. 114.

³ *Matter of Clements*, 78 Mo. 352. See, as to the status of adopted children, *post*, § 10.

⁴ *Ray, J.*, in *Matter of Scarritt*, 76 Mo.

565, 582 *et seq.*, quoting Schoul. Dom. Rel. 342 *et seq.*, and Hurd on Habeas Corpus, 461.

⁵ *Matter of Scarritt*, *supra*; see dissenting opinion of Henry, J., p. 589 *et seq.*

⁶ *Brooke v. Logan*, 112 Ind. 183, citing numerous authorities, p. 185; *Washaw v. Gimble*, 50 Ark. 351, and authorities cited, p. 354; *Wishard v. Medaris*, 34 Ind. 168 (a contract in writing by a mother, but specifying no time).

⁷ *Clark v. Bayer*, 32 Ohio St. 299, 300; *Hoxsie v. Potter*, 17 Atl. R. (R. I.) 129; *State v. Libbey*, 44 N. H. 321; *Merritt v. Swimley*, 82 Va. 433, 438; and see cases *infra*, under note 5, p. 20.

⁸ *Drumb v. Keen*, 47 Iowa, 435, 437; *Miller v. Wallace*, 76 Ga. 479, 487; *State v. Barrett*, 45 N. H. 15.

⁹ *People v. Kearney*, 31 Barb. 430.

¹⁰ *Commonwealth v. McKeagy*, 1 Ashm. 248, 259.

Statute authorizing commitment of a child to a penal institution is unconstitutional.

Child's welfare is the paramount consideration on *habeas corpus* for its possession.

authorizing commitment of a child to a reform school without trial is unconstitutional.¹ The anxious purpose of courts in deciding the relative rights of litigants (usually in *habeas corpus* proceedings) to the custody of infants, and to the accomplishment of which all other considerations are usually held to be secondary, is the welfare and best interest of the children.² Hence, where a father, or mother, or both, voluntarily release the custody of a child to a third person, such contract will be held binding if the child is well cared for and unwilling to return to its parent,³ and revocable only for sufficient legal reason.⁴ The rights and feelings of those who have for years discharged the obligations of parents, and who entertain for the object of their solicitude and care a love and affection hardly second to parental love, should not be entirely disregarded, especially when, as is generally the case, the attachment is mutual between the child and those standing *in loco parentis*.⁵

So the father may, by immoral or vicious habits or conduct,⁶ or by ill-usage of the child,⁷ forfeit his parental right. In such cases courts will exercise a discretion in awarding the custody of the child as its welfare may demand,⁸ consulting, if it appear advisable, the child itself as to such custody.⁹ Statutes conferring such discretion on courts in cases of disputed rights of custody, have

Right to custody may be forfeited

and determines the right of custody.

¹ *People v. Turner*, 55 Ill. 280, 284; *State v. Ray*, 63 N. H. 406.

² See *infra*, as to the forfeiture of the right to custody.

³ *Coffee v. Black*, 82 Va. 567; *Curtis v. Curtis*, 5 Gray, 535; *Dumain v. Gwynne*, 10 Allen, 270.

⁴ *Bentley v. Terry*, 59 Ga. 555; *Re Murphy*, 12 How. Pr. 513; *Janes v. Cleg-horn*, 54 Ga. 9, 14; *Matter of McDoules*, 8 Johns. 328, 331; *Enders v. Enders*, 164 Pa. St. 266.

⁵ Per Henry, J., dissenting, *In re Scarritt*, 76 Mo. 565, 592; *Chapsky v. Wood*, 26 Kans. 650, 657; *Verser v. Ford*, 37 Ark. 27, 31; *Paul v. Gott*, 14 Law Rep. 269; *People v. Porter*, 23 Ill. App. 196.

⁶ Per Elliott, J., in *State v. Banks*, 25 Ind. 495; *State v. Baird*, 18 N. J. Eq. 194; *Bonny v. Bonny*, 9 South W. R. (Ky.), 404.

⁷ *People v. —*, 19 Wend. 16; *State v. Grisby*, 38 Ark. 406, 409.

⁸ Per Story, J., in *United States v. Green*, 3 Mason, 482, 485; *Matter of Holmes*, 19 How. Pr. 329, 332; *Lapitino v. De Giglio*, 6 Phila. 304; *Gardenhire v. Hinds*, 1 Head, 402, 410; *Matter of Mitchell*, R. M. Charlton, 489, 494; *Estate of Linden*, Myr. 215; *In re Bort*, 25 Kans. 308; *Corrie v. Corrie*, 42 Mich. 509; *People v. Brown*, 35 Hun, 324. In Kansas an infant was expatriated and sent to a grandmother in England on the ground that its welfare dictated this course: *In re Bullen*, 28 Kans. 781.

⁹ *In re Goodenough*, 19 Wis. 274, 279; *State v. Scott*, 30 N. H. 274, 278; *Merritt v. Swimley*, 82 Va. 433; *People v. Porter*, 23 Ill. App. 196.

been interpreted to mean that the father is not entitled as a matter of right to his child's custody;¹ but this, it seems, must be understood simply as an emphatic statement of the general rule, that the sound discretion of the court is to be exercised for the best interest and welfare of the infant primarily, not arbitrarily in disregard of the father's natural right.² In Nebraska³ and Indiana,⁴ under statutes granting custody to the father, if competent to transact his own business and not otherwise unsuitable, the court is bound to look only to the welfare of the child, awarding its custody without reference to the rights or wishes of the parties. A statute providing for the placing of neglected children under the custody of the State Board of Health until their majority, by the order of a court or magistrate, without notice to the father, is held constitutional, and the commitment under it legal, on the ground that such commitment does not conclusively bind the father.⁵

On the death of the father, his authority passes to the mother, under like discretionary powers of courts.⁶ This right of the mother to the custody of her child is paramount to the right of a testamentary guardian, unless the statute plainly direct otherwise;⁷ but may, in some of the States, be lost by her remarriage.⁸

Right of custody after father's death.

§ 8. **Right of Parents to the Services of their Children.** — The father is entitled to the services of his child, including earnings, if services are rendered for others, during the whole period of its infancy,⁹ and so, in most States, the

Right to child's services and earnings.

¹ *Smith v. Bragg*, 68 Ga. 650. And see *Washaw v. Gimble*, 50 Ark. 351.

² *Gibbs v. Brown*, 68 Ga. 803; *Brinster v. Compton*, 68 Ala. 299, 302; *Ex parte Boaz*, 31 Ala. 425, 427; *Ex parte Murphy*, 75 Ala. 409; *Merritt v. Swimley*, 82 Va. 433; exhaustive opinion of Hall, J., in *Miller v. Wallace*, 76 Ga. 479, 483.

³ *Sturtevant v. State*, 15 Neb. 459, 462 (disregarding the father's right, although found "in every respect a suitable person," and "greatly attached to his child").

⁴ *Jones v. Darnall*, 103 Ind. 569, 572.

⁵ *Farnham v. Pierce*, 141 Mass. 203; *Milwaukee School v. Supervisors*, 40 Wisc. 328, 339; *House of Refuge v. Ryan*, 37 Oh. St. 197 (approving *Prescott v. State*, 19 Oh. St. 188), 204.

⁶ *Striplin v. Ware*, 36 Ala. 87; *People v. Wilcox*, 22 Barb. 178, 184; *Osborn v. Allen*, 26 N. J. L. 388; *Dedham v. Natick*, 16 Mass. 135, 140; *Garner v. Gordon*, 41 Ind. 92, 103; *Moore v. Christian*, 56 Miss. 408; *State v. Reuff*, 29 W. Va. 751, 763; *Furman v. Van Sise*, 56 N. Y. 435.

⁷ See the remarks of Sanderson, J., in *Lord v. Hough*, in eloquent condemnation of that feature of the statute of 12 Car. II. c. 24, which gave the custody of children to the testamentary guardian as against the mother: 37 Cal. 657, 666.

⁸ *Worcester v. Marchant*, 14 Pick. 510, 512; *State v. Scott*, 30 N. H. 274, 277; *Spears v. Snell*, 74 N. C. 210, 214.

⁹ *Bundy v. Dodson*, 28 Ind. 295; *Sargent v. Matthewson*, 38 N. H. 54; *Magee v. Holland*, 27 N. J. L. 86, 96; *Bell v. Hal-*

mother after the father's death;¹ but as to the mother's right the authorities are not unanimous.²

In connection with the parental right to the custody and services of minor children may be mentioned the right of action for injuries to them, sustained by either parent or child. In England, the doctrine is, that the loss of service constitutes the basis of action, and the father has no remedy, even for his expenses, where the child is of such tender years as to be incapable of rendering any services; but in this country a more liberal and more reasonable view is adopted, basing the right of action upon the parental relation, rather than upon that of master and servant. The parents are allowed compensation for consequential loss, irrespective of the age of the minor;³ including not only loss of services up to the time of trial, but also for prospective loss during the child's minority, as well as for expenses actually and necessarily incurred, or which are immediately necessary in consequence of the injury in the care and cure of the child:⁴ but not for future prospective contingent expenses, which, it seems, can only be recovered, if at all, in an action by the child.⁵ Where an action is given by statute to both parent and child, the action by the parent does not bar the action by the minor for injuries received by the latter which could not be considered in assessing the damages in the suit by the parent.⁶

§ 9. **Duty of Parents to educate and maintain their Children.** — Correlative to the rights of parents to the services and earnings of their infant children, is their duty to support and protect them, and their liability in case of omission

lenback, Wright, 751; *Sherlock v. Kimmel*, 75 Mo. 77; per Virgin, J., in *Gilley v. Gilley*, 79 Me. 292, citing numerous authorities, p. 294.

¹ *Girls' Industrial Home v. Fritchey*, 10 Mo. App., affirmed in *Matthews v. Mo. Pac. R. Co.*, 26 Mo. App. 75, 83; *Jones v. Tevis*, Litt. 25, 27; *State v. Baltimore R. Co.*, 24 Md. 84, 107; *Burk v. Phips*, 1 Root, 487; *Jones v. Buckley*, 19 Ala. 604; *Campbell v. Campbell*, 11 N. J. Eq. 268, 272; *Cain v. Devitt*, 8 Iowa, 116, 120; *Matthewson v. Perry*, 37 Conn. 435; *Hammond v. Corbett*, 50 N. H. 501; *Kennedy v. N. Y. R. R. Co.*, 35 Hun, 186; *Guion v. Guion*, 16 Mo. 52; *Furman v. Van Sise*,

56 N. Y. 435 (*Allen and Folger, JJ.*, dissenting, p. 440).

² *Cain v. Dewitt*, *supra*; *Morris v. Law*, 4 Stew. & P. 123; *Passenger R. Co. v. Stutler*, 54 Pa. St. 375, 378; *Cummings v. Cummings*, 8 Watts, 866; *Whitehead v. St. L. & I. M. R. R. Co.*, 22 Mo. App. 60; *Commonwealth v. Murray*, 4 Binn. 487.

³ *Netherland-American Co. v. Hollander*, 59 Fed. R. 417; *Dennis v. Clark*, 2 Cush. 347, 349; *Durden v. Barnett*, 7 Ala. 169; *Sykes v. Lawlor*, 49 Cal. 236.

⁴ *Cuming v. Railroad*, 109 N. Y. 95.

⁵ *Cuming v. Railroad*, *supra*.

⁶ *McNamara v. Logan*, 100 Ala. 187, 195.

of this duty for necessities furnished them by strangers.¹ The obligation of a parent to maintain his offspring until they attain majority is sometimes held to be a legal, as well as a moral, duty, and therefore to support the presumption of a promise to pay for necessities furnished them by third persons in case of neglect by the parents;² but in some of the States it is held to be a moral duty only, not capable, without statutory enactment, of legal enforcement, so that no promise to pay can be implied from its mere neglect, but such promise must, to bind the parent, be found from circumstances sufficient to warrant the inference, if not expressly made.³

The right to the services and earnings of a child ceases when the duty to support has ceased;⁴ but the converse of this proposition, that the duty to support ceases with the right to the custody,⁵ is sometimes modified; notably in cases of divorce between parents, where the custody of a child is awarded to the mother in exclusion of the father, in which case the latter cannot throw off his legal obligation to provide for its support.⁶ But generally, in the absence of a judicial decree, the right to the custody and services and the obligation to support and educate are reciprocal.⁷

Right to services of child ceases with the duty to support it.

The duty to support exists whether the infants have property of their own or not;⁸ but if by reason of poverty and bodily infirmity

¹ *Stovall v. Johnson*, 17 Ala. 14, 18; *Thompson v. Dorsey*, 4 Md. Ch. 149; *Townsend v. Burnham*, 33 N. H. 270, 277; *Plaster v. Plaster*, 47 Ill. 290, 292; *Rogers v. Turner*, 59 Mo. 116; *Hanford v. Prouty*, 133 Ill. 339, 354.

² *Van Valkinburgh v. Watson*, 13 Johns. 480; *Johnson v. Barnes*, 69 Iowa, 641 (holding that under the statute a divorced wife cannot recover from the father for the support of his children), 643; *Porter v. Powell*, 79 Iowa, 151, 154; *Stanton v. Wilson*, 3 Day, 37, 56.

³ *Kelley v. Davis*, 49 N. H. 187, 189; *Gordon v. Potter*, 17 Vt. 348, 350; *Hunt v. Thompson*, 4 Ill. 179, 180; *Gotts v. Clark*, 78 Ill. 229, 230; *Freeman v. Robinson*, 38 N. J. L. 383, 384; *Johnson v. Onsted*, 74 Mich. 437.

⁴ *Jenness v. Emerson*, 15 N. H. 486; *Whitehead v. Railroad Co.*, 22 Mo. App. 60, 67.

⁵ *Hancock v. Merrick*, 10 Cush. 41;

Brow v. Brightman, 136 Mass. 187; *Passenger R. Co. v. Stutler*, 54 Pa. St. 375, 378.

⁶ *Courtright v. Courtright*, 40 Mich. 633 (although, in this case, the wife had contracted to support the child), 635; *Holt v. Holt*, 42 Ark. 495; *Pretzinger v. Pretzinger*, 45 Oh. St. 452, 458; *Cowls v. Cowls*, 8 Ill. 435, 442.

⁷ *Ramsey v. Ramsey*, 121 Ind. 215, 221; *Husband v. Husband*, 67 Ind. 583, 584.

⁸ *Hines v. Mullins*, 25 Ga. 696; *Addison v. Bowie*, 2 Bland, 606, 619; *Tomkins v. Tomkins*, 18 N. J. Eq. 303; *Haase v. Roehrscheid*, 6 Ind. 66; *Dawes v. Howard*, 4 Mass. 97; *Presley v. Davis*, 7 Rich. Eq. 105, 109; *Buckley v. Howard*, 35 Tex. 565, 576; *Estate of Wood*, 13 Phila. 391; *Beardsley v. Hotchkiss*, 96 N. Y. 201, 220; *Kinsey v. State*, 98 Ind. 351, 356; *Moore v. Moore*, 31 S. W. (Tex. C. App.) 532.

Maintenance
out of child's
estate.

Mother's right
to be allowed
for mainte-
nance.

the father is unable to support his child, courts will appropriate the estate of the infant to enable it to be properly educated and maintained;¹ and the mother is generally, especially where her own fortune is inadequate, entitled to be allowed for the maintenance of her children out of their estate.² But it is held in some jurisdictions that there is no difference between the parents as to their duty to maintain their offspring; the mother is under the same obligation as the father in this behalf, during her widowhood.³ There will be occasion hereafter to treat more fully of the principles governing the allowance to parents and others for the education and support of infants who are possessed of estates in their own right.⁴

§ 10. **Status of Adopted Children.** — The adoption of a stranger into one's family, or accepting the child of another as one's own child and heir,⁵ created a domestic relation well known, with its legal consequences, to the ancients, of whom the Athenians and Spartans, the Romans and ancient Germans are mentioned by historians and law-writers. In the Roman law it suffered considerable change, and the doctrine, as modified by Justinian, was transmitted to the modern nations of Europe. The Code Civil of France contains stringent provisions in connection therewith,⁶ whence it passed into the laws of Louisiana;⁷ from the Spanish law it was transmitted to Mexico, and thus became the law of Texas when it formed part of that country.⁸

¹ *Kendrick v. Wheeler*, 85 Tex. 247, 252; *Watts v. Steele*, 19 Ala. 656, 658; *Myers v. Myers*, 2 McCord Ch. 214, 254, 264; *Newport v. Cook*, 2 Ashm. 332, 340; *Dupont v. Johnson*, Bai. Eq. 279; *Otte v. Becton*, 55 Mo. 99, 101. In Tennessee the Chancellor allows the father for maintenance and education if he "be without the necessary means to maintain his children according to their future expectations; or, if he have the means, but the income of the children be larger than his own:" *Trimble v. Dodd*, 2 Tenn. Ch. 500, 502, citing many authorities. See, to similar effect, *Kendall v. Kendall*, 60 N. H. 527.

² *Osborne v. Van Horn*, 2 Fla. 360, 362; *Whipple v. Dow*, 2 Mass. 415; *Mowbry v. Mowbry*, 64 Ill. 383, 386; *Engelhardt v. Yung*, 76 Ala. 534, 539; *Kinsey v. State*, 98 Ind. 351, 356; *Chapline v. Moore*, 7 T. B. Mon. 150, 173; *Hughart v. Spratt*, 78 Ky. 313, 317.

³ *Alling v. Alling*, 52 N. J. Eq. 92; *Wilkes v. Rogers*, 6 Johns. 566, 586.

⁴ *Post*, §§ 48 *et seq.*

⁵ *Anderson Dict. L. "Adoption."*

⁶ The adopter must be fifty years of age, fifteen years older than the person adopted, and have no children of his own; the adoption of minors takes effect only after the minor has been supported by the adopter for six years, &c.: Code Nap. Art. 343 *et seq.*, promulgated April 2, 1803, tit. "De l'Adoption."

⁷ But was omitted from the Code of 1808: Per Merrick, J., in *Vidal v. Com-magee*, 13 La. An. 516. Under the Constitution of 1865 it was again introduced in a modified form, and incorporated into the Rev. Civil Code of 1870, § 214.

⁸ *Teal v. Sevier*, 26 Tex. 516, 520; *Eckford v. Knox*, 67 Tex. 200, 204. According to these cases no one could, under the Mexican law, adopt a stranger into his

Adoption is entirely ignored by the common law.¹ But within forty years past nearly all the States of the Union have enacted statutes authorizing the adoption of children, following, it seems, the lead of Massachusetts in this respect.² These statutes vary greatly in their details; but their common purpose is to enable persons so disposed to vest in children of others the rights and privileges which they would possess if they were children of their own blood, including the right of inheritance. The persons adopting must, in all the States legislating on the subject, of course be adults. In Louisiana the statute originally required the adopter to be forty years of age, and fifteen years older than the person adopted,³ but now it is sufficient that the adopter be above, the person adopted below, the age of twenty-one years.⁴ It is still provided in California,⁵ Dakota,⁶ and Montana⁷ that the adopter be ten, in Idaho⁸ that he be fifteen years older than the one adopted. In Massachusetts the person adopted must be younger than the one adopting, unless it be the wife, husband, brother, sister, uncle, or aunt, either of the whole or half blood, of the adopter.⁹ In Rhode Island, the Probate Court has no jurisdiction over a proceeding to adopt a person of full age, and such an adoption is futile,¹⁰ on the ground that the word "child" used in the statute empowering probate courts to grant leave to adopt, has reference to a minor only;¹¹ but a different conclusion is reached in Indiana, where an adult may be adopted.¹² In Iowa an adoption is held not valid, if the deed of adoption is not filed until after the majority of the child.¹³ Nearly

Adoption unknown to the common law.

Statutes of adoption.

Requisites to adoption.

Age.

family as co-heir if he had children of his own living. The statute of Texas (Sayles' Civ. St. § 1) now allows adopted children to inherit the adopter's estate to the extent of one-fourth thereof.

¹ *Morris v. Dooley*, 59 Ark. 483, 486. See the remarks of Clark, J., in *Nugent v. Powell*, 33 Pac. (Wyo.) 23, 25.

² See a review of Whitmore's "Law of Adoption in the United States," 3 Cent. L. J. 397; also the editor's note to *Barnhizel v. Ferrel*, 14 Am. L. Reg. 682.

³ *Succession of Vollmer*, 40 La. An. 593.

⁴ *Succession of Vollmer*, *supra*.

⁵ *Deering's Ann. Civ. Code*, 1885, § 221 *et seq.*

⁶ *Rev. Code*, 1895, § 498.

⁷ *Civ. Code*, § 311.

⁸ *Rev. St.* 1887, § 2545.

⁹ This seems to be the sense of the statute (*Publ. St.* 1882, p. 824, § 1). By a different interpretation, the right to adopt any of the persons in the relationship mentioned would be excluded.

¹⁰ *Williams v. Knight*, 18 R. I. 333, 337.

¹¹ *Moore, Petitioner*, 14 R. I. 38.

¹² *Markover v. Krauss*, 132 Ind. 294, 297.

¹³ *McCollister v. Yard*, 57 N. W. 448.

Husband and wife consenting.

all the statutes provide that if the person adopting be married, both spouses must join in the act of adopting, or at least consent thereto;¹ but where the adoption is valid if made by one spouse alone, the other not joining or consenting is not bound thereby.² In most States, also, the consent

Consent of the person adopted.

of the child is required, if it be of the age of fourteen; in California,³ Dakota,⁴ Idaho,⁵ Montana,⁶ Nevada,⁷ and New York⁸ if it be twelve years of age; in New Jersey it is held that consent of the child is necessary whether it be under or over fourteen years old.⁹ It seems that where the effect of the adoption is limited to make the person adopted an heir, no consent is necessary;¹⁰ nor is notice to the child necessary, unless so required by statute;¹¹ but to make a minor the member of

Consent of parents or blood-relatives of the child, guardian, etc.

a new family by the adoption, giving parental rights and authority to the parties adopting, in place of those who possessed such authority before, is an interference with the rights of the latter which will not be permitted without their own free consent, or proof of circumstances showing such right to be inconsistent with the child's interest.¹² Hence most States require either the consent of the parents, surviving parent, guardian, or other person, corporation or institution having lawful custody of the child to be shown affirmatively, or that notice be given to them, so that they may appear and be heard upon the question of adoption pending before the court.¹³ The consent of a guardian, without notice to the father of an ille-

¹ The statutes of Colorado: Mills' Ann. St. 1891, § 396, and of Missouri provide that a married woman *may* join her husband in a deed of adoption: Rev. St. 1889, § 969. The Indiana statute authorizes a joint adoption by husband and wife: *Markover v. Krauss*, 132 Ind. 294, 302, and is construed as authorizing a married man to adopt a child without his wife joining in the petition, and that an adopted child may have an adopted father, without an adopted mother: *Barnhizer v. Ferrell*, 47 Ind. 335, 339; *Krug v. Davis*, 87 Ind. 590, 595.

² *Reinders v. Koppelman*, 68 Mo. 482, 485; *Stanley v. Chandler*, 53 Vt. 619, 625 (in this case the adoption was by act of legislature); *Sharkey v. McDermott*, 16 Mo. App. 80.

³ C. C. § 221 *et seq.*

⁴ Comp. L. 1887, § 2622 *et seq.*

⁵ Rev. St. 1887, § 2545 *et seq.* In North Dakota, if over ten: Rev. Code, 1895, § 2801.

⁶ Civ. C. 1895, § 314.

⁷ Gen. St. 1885, § 604.

⁸ *Banks & Bro. Rev. St. 1889*, p. 2608.

⁹ *Winans v. Luppie*, 47 N. J. Eq. 302.

¹⁰ The statute of Vermont, however, provides that an adult, to be adopted, must join in the deed of adoption: Rev. L. 1880, § 2537.

¹¹ *Van Matre v. Sankey*, 148 Ill. 536, 549.

¹² *Baker v. Strahorn*, 33 Ill. App. 59; *Winans v. Luppie*, 47 N. J. Eq. 302. As to right of custody and its forfeiture, *ante*, § 7.

¹³ *Burger v. Frakes*, 67 Iowa, 460, 465; *Chambers, in re*, 22 Pac. R. (Cal.) 138; *Furgeson v. Jones*, 20 Pac. R. (Oreg.) 842;

gitimate, whose mother is dead, is sufficient under a statute requiring notice to the parents or guardian, to validate an act of adoption by decree of a probate court.¹ So the certificate of approval by the judge indorsed on an agreement of adoption, and ordered to be filed, is sufficient to entitle the adopted child to a distributive share of the estate of the person adopting it;² and so adoption proceedings may be binding on the collateral heirs of the husband of a wife adopting, though not conclusive against himself for want of notice.³ Permanent residence in the district within which the court has jurisdiction is not necessary for such jurisdiction; it is sufficient if the petitioner be a temporary resident therein;⁴ and so the fact that the residence of the adopting parents was in the county in which the court had jurisdiction, may be shown by parol, if the record is silent on that point.⁵ Where the act of adoption is by deed between the parties, not requiring the sanction or judgment of a court or judicial tribunal,⁶ the terms of the statute must be complied with, or the act will be held void.⁷ But if the act of adoption is sanctioned or decreed by a court having jurisdiction, on notice to all persons entitled thereto, as is required in most of the States, the judgment or decree will not be questioned collaterally or defeated by irregularities;⁸ but parties having an interest in the adoption or its consequences (such as parents, blood relatives, friends, or any of the parties entitled to notice under the statute), if they have not given their

Temporary residence in the county confers jurisdiction on the court of that county.

Strict compliance with statutory requirements.

Decree of adoption not assailable collaterally.

Luppie v. Winans, 37 N. J. Eq. 245, 249; *Humphrey*, Appellant, 137 Mass. 84; *Schiltz v. Roenitz*, 86 Wis. 31. In Wyoming it is held that where a father has abandoned his child, his consent is not necessary, though the statute requires the father's consent: *Nugent v. Powell*, 33 Pac. (Wyo.) 23.

¹ *Gibson*, Appellant, 154 Mass. 378, 381; *Van Matre v. Sankey*, 148 Ill. 536, 557.

² *Evans' Estate*, 106 Cal. 562.

³ *Nugent v. Powell*, 33 Pac. (Wyo.) 23.

⁴ *Van Matre v. Sankey*, 148 Ill. 536, 549, following Appeal of Wolf, 13 Atl. 760.

⁵ *Matter of Williams*, 102 Cal. 70, 76.

⁶ Adoption has been declared a ministerial act, not judicial, in Alabama: *Ab-*

ney v. De Loach, 84 Ala. 393 [and in Louisiana: *Succession of Vollmer*, 40 La. An. 593.

⁷ The failure to file for record during the life-time of the adopter a deed of adoption, otherwise in strict accordance with the statute, is fatal: *Tyler v. Reynolds*, 53 Iowa, 146; *Shearer v. Weaver*, 56 Iowa, 578. The consent of parties need not, however, appear in the body of the instrument; it may be evidenced by the signatures: *Bancroft v. Bancroft*, 53 Vt. 9, 12.

⁸ *Matter of Williams*, 102 Cal. 70, 80; *Edds*, Appellant, 137 Mass. 346, 347; *Nugent v. Powell*, 33 Pac. 23; *Brown v. Brown*, 101 Ind. 340; *In re Newman*, 75 Cal. 213, 219. But see as to the law in Arkansas, *infra*, *Morris v. Dooley*.

Appeal from
decree of
adoption. consent, may appeal from the decree or judgment, or seek a remedy in equity.¹ In many of the States the appeal is provided for by statute. The right of appeal does not, however, extend to the heirs in their own right, because, as such, they have no vested right, nor to the legal representative of a deceased adopter, because the adoption was his own act.

Statutes of adoption, though in derogation of the common law, are not to be construed so strictly as to defeat the legislative intent;² but no presumption arising out of collateral facts can be indulged in to supply proof of the facts required by the statute.³ In Arkansas the proceeding in the Probate Court to adopt a child is held a special statutory proceeding, not according to the course of the common law, nor in the exercise of the court's general jurisdiction; and that a judgment rendered therein will be void upon collateral attack, if neither the judgment entry nor the petition show the child to be a resident of the county.⁴ A similarly strict compliance with statutory provisions is required in California⁵ and Iowa.⁶

In California the fact that a child is under the jurisdiction of a court in divorce proceeding between its parents, does not prevent another court from entertaining jurisdiction in proceedings for its adoption with the consent of the parent to whom custody had been decreed.⁷

The person having adopted an infant is entitled to its custody and services, even against its natural parents and statutory guar-

¹ *Murray v. Barber*, 17 Atl. R. (R. I.) 553; *Brown v. Brown*, *supra*.

² *Abner v. De Loach*, 84 Ala. 393, deciding a number of points touching the formalities of adoption: *Fosburgh v. Rogers*, 114 Mo. 122, 133.

³ *In re Romero*, 75 Cal. 379, 381. To similar effect: *Sharkey v. McDermott*, 16 Mo. App. 80, 85. This case was reversed by the Supreme Court, which held that a parol contract of adoption, executed in good faith by the party to be adopted, and performed in part by the other party, is not avoided by the Statute of Frauds: *Sharkey v. McDermott*, 91 Mo. 647, 652; and that the wife was bound by said contract, the adopted child having continued to live with her and under her services after the husband's death: *Ib.*, p. 648, syllabus. To same effect: *Swartz v. Steel*,

8 Oh. Ct. Ct. 154; *Wright v. Wright*, 99 Mich. 170; but see, for the contrary, *Shearer v. Weaver*, 56 Iowa, 578, 582; and to similar effect, *Ex parte Clark*, 87 Cal. 638, 640.

⁴ *Morris v. Dooley*, 59 Ark. 483. The judgment is based on the doctrine, that the residence of the ward in the county within which the court has jurisdiction, is a jurisdictional fact, and that in a proceeding under a special statute, not according to the course of the common law, the court *quoad hoc* must be considered an inferior court, in which the proceedings are void, unless the jurisdictional facts appear of record: p. 487, two of the five judges dissenting: p. 489.

⁵ *Ex parte Clark*, 87 Cal. 638, 641.

⁶ *Shearer v. Weaver*, 56 Iowa, 578, 583.

⁷ *Younger v. Younger*, 106 Cal. 377.

dian¹ to the full extent as if the adopting were the natural father. By the statutes of Colorado,² Georgia,³ Illinois,⁴ Indiana,⁵ Kansas,⁶ Kentucky,⁷ Louisiana,⁸ Maine,⁹ Massachusetts,¹⁰ Michigan,¹¹ Minnesota,¹² Mississippi,¹³ Missouri,¹⁴ Nebraska,¹⁵ New Hampshire,¹⁶ New Jersey,¹⁷ New York,¹⁸ Ohio,¹⁹ Oregon,²⁰ Pennsylvania,²¹ Rhode Island,²² West Virginia,²³ and Wisconsin,²⁴ the same rights for support, education, and protection are secured to adopted children against the persons adopting them, as if they were the natural legitimate children of these persons, with the exception, to be noticed below, of some modification of the law of inheritance. The right of adopted children has been held to extend to the right of homestead descending from a deceased adopter.²⁵

The right of the children conditions, of necessity, the corresponding right of the adopting parents to the custody, control, and services of the children,²⁶ which will be awarded according to the best interests of the child, with like discretionary powers in the courts as in cases contested by a natural father or mother.²⁷

It is, under the statutes of most of the States, within the power of the court sanctioning the adoption to change the name of the adopted child from that of the natural to that of the adopting father; in Missouri the power to change the name of an adopted child is conferred upon the Probate Court,²⁸ in Colorado upon the District or County Court.²⁹ A

Rights of persons adopting.

Rights of persons adopted.

Change of name of adopted persons.

¹ *Rives v. Sneed*, 25 Ga. 612, 622; *Brown v. Welsh*, 27 N. J. Eq. 429, 433; *Matter of Clements*, 78 Mo. 352; *Cofer v. Scroggins*, 98 Ala. 342, 346.

² *Mills' An. St.* 1891, § 399.

³ *Code*, 1882, §§ 1788, 1789.

⁴ *St. & Curt. Ann. St.* 1885, ch. 4, ¶ 5.

⁵ *Burns' An. St.* 1894, § 838; *Barnhizer v. Ferrell*, 47 Ind. 335.

⁶ *Dass. Comp. L.* 1885, § 3482.

⁷ By consent of parties the court may decree the control of the adopted child to the adopter: *Gen. St.* 1887, ch. 31, §§ 17, 18.

⁸ *Rev. Civ. Code*, § 214; *Succession of Houser*, 37 La. An. 839.

⁹ *Freeman's Supp.* 1895, ch. 67, § 35.

¹⁰ *Publ. St.* 1882, p. 825.

¹¹ *How. St.* 1882, § 6379.

¹² *Gen. St.* 1891, § 3931.

¹³ *Rev. Code*, 1880, § 1496.

¹⁴ *Rev. St.* 1889, § 970; *Moran v. Stewart*, 122 Mo. 295, 298.

¹⁵ *Comp. L.* 1887, p. 831.

¹⁶ *Publ. St.* 1891, ch. 181.

¹⁷ *Rev.* 1877, p. 1345.

¹⁸ *Banks & Bro. Rev. St.* 1889, p. 2608.

¹⁹ *Rev. St.* 1880, § 3137.

²⁰ *Hill's Ann. L.* 1887.

²¹ *Bright. Purd. Dig.* 1885.

²² *Publ. St.* 1882, ch. 164.

²³ *Code*, 1877, ch. 122, § 2.

²⁴ *Rev. St.* 1878, § 4021 *et seq.*

²⁵ *Per Belcher, C. C.*, in *Matter of Romero*, 75 Cal. 379, 381; *Cofer v. Scroggins*, 98 Ala. 343, 347.

²⁶ *Matter of Clements*, 78 Mo. 352; and see cases, *supra*.

²⁷ *Fouts v. Pierce*, 64 Iowa, 71. As to the power of courts in decreeing the custody of children, see *ante*, § 7.

²⁸ *Rev. St.* 1889, § 971.

²⁹ *Gen. St.* 1883, p. 119.

deed adopting a child by the surname of the adopting parents, without disclosing his former name, is not for that reason invalid, if his identity is otherwise indicated.¹

Where no property rights have or are likely to be vested in the child, and it appears to be for its best interest, the decree of adoption may be vacated on the petition of the natural and adoptive parents.² And although the law provide for an application to the surrogate's court of the county in which the foster parent resides for a cancellation of agreements of adoption, the jurisdiction of the Supreme Court is not thereby taken away to control the custody of children by *habeas corpus*.³

§ 11. **Inheritance by and from Adopted Children.**—The most important consequence of adoption, in many instances the sole or controlling motive thereto, is to confer upon the person adopted the right to inherit the estate of the deceased adopter. The consideration of this incident to adoption is somewhat remote from the purpose of this treatise; yet it may add to its utility to take notice of the salient principles governing this subject. The general rule is, that the adopted person inherits from the person adopting to the same extent that a legitimate child would inherit.⁴ But this is a mere statutory right; it determines only what the adopted child is entitled to under the Statute of Descent and Distribution, unless augmented or diminished by the terms of the contract of adoption, as may be the case, for instance, in Mississippi,⁵ Nebraska,⁶ and Tennessee;⁷ and as may be the case in the absence of a statute, if the consent to the adoption, on the part of those having authority to give or withhold such consent, is induced by an agreement that the child shall inherit. In such case, if the contract of adoption has been performed, and the child has remained in the family of the adopter

¹ Fosburgh v. Rogers, 114 Mo. 122, 134.

² Matter of Gatjkowski, 12 Pa. Co. Ct. R. 191.

³ People v. Paschal, 68 Hun, 344.

⁴ Fosburgh v. Rogers, 114 Mo. 122, 131. The exception to this rule in Texas, where the inheritance of an adopted stranger is limited to one-fourth of an intestate's estate, is noted *ubi supra*.

⁵ The petition must state what gifts,

benefits, grants, &c., it is proposed to confer by the decree: Rev. Code, 1880, § 1496.

⁶ The petition must declare in writing upon what terms the child is to be adopted, and witnessed by two witnesses; Comp. L. 1887, p. 831.

⁷ The decree may state any modification of the effect of adoption: Code, 1884, § 4390.

until his majority, the latter cannot deprive such child of his right to the inheritance by fraudulently disposing of his property in his lifetime, or by will. Such an agreement is not affected by the statute of frauds, though not in writing, as it does not relate to the sale or transfer of real estate,¹ and is also taken out of the operation of the statute by part performance.² The identity of the person adopted is not changed;³ it does not become the child of the adopter's wife, if she did not join in the adoption, so as to affect her rights as the adopter's widow.⁴ Nor does the adopted child take under a devise to the children of the person adopting,⁵ although entitled under a devise to those who would be entitled to the adopter's estate under the intestate laws.⁶ In recognition of this doctrine the statutes of many of the States affirmatively disable adopted children from inheriting any property of the adopting parent limited to the heirs of his body, etc. So, for instance, in New Jersey,⁷ New York,⁸ Oregon,⁹ Rhode Island,¹⁰ West Virginia,¹¹ and Wisconsin.¹² In Missouri, where the statute gives the widow of a husband dying "without a child or other descendant in being" her election to take dower as at common law, or one-half of the real and personal estate belonging to the husband at the time of his death, it is held that the existence of an adopted child capable of inheriting defeats the widow's right of election.¹³

Not entitled under devise to adopter's children.

Nor to estate limited to adopter's children.

By the adoption, the child becomes a member of the family of the adopter. If its parents be living, it will thus unite the status of child to two families, and complications sometimes arise in respect to the right of inheritance, particularly if the parents by adoption, or those by blood, or both, have other children. Several provisions in the various statutes anticipate questions that may arise in such cases. In

Inheritance by and from next of kin of adopter or person adopted.

¹ *Quinn v. Quinn*, 5 S. Dak. 328, 333, 336, citing numerous cases.

² *Sharkey v. McDermott*, 91 Mo. 647; *Wright v. Wright*, 99 Mich. 170; *Shahan v. Swan*, 48 Oh. St. 25, 31; *Van Duyne v. Vreeland*, 11 N. J. Eq. 370, 378; s. c. 12 N. J. Eq. 142, 150.

³ *Schafer v. Eneu*, 54 Pa. St. 304, 306; *Barnhizel v. Ferrell*, 47 Ind. 335, 338; *Stanley v. Chandler*, 53 Vt. 619, 624; *Russell v. Russell*, 84 Ala. 48, 52.

⁴ *Keith v. Ault*, 43 N. E. (Ind.) 924.

⁵ *Schafer v. Eneu*, *supra*; *Russell v. Russell*, *supra*.

⁶ *Johnson's Appeal*, 88 Pa. St. 346, 353.

⁷ Rev. 1877, p. 1345.

⁸ *Banks & Bro. Rev. St.* 1889, p. 2608.

⁹ *Hill's Ann. St.* 1887, § 2943.

¹⁰ *Publ. St.* 1882, ch. 164, § 7.

¹¹ *Code*, 1891, ch. 122, § 4.

¹² *Rev. St.* 1878, § 4021 *et seq.*

¹³ *Moran v. Stewart*, 122 Mo. 295, 300.

Connecticut,¹ for instance, the statute allows adopted children to inherit from the adopting, but not from the natural parents. In Connecticut and Illinois,² the adopting parents inherit from the adopted children, but are excluded from such inheritance in Georgia,³ Iowa,⁴ Maine,⁵ and, it seems, North Carolina.⁶ Adopted children inherit from their natural as well as from the adopting parents in Iowa,⁷ but not from the natural parents in Connecticut.⁸ The natural parents inherit from their children adopted by others under the statutes of Indiana,⁹ and in Ohio,¹⁰ if an adopted child die before the adopting parent, leaving no issue, the estate of the latter, on his subsequent death, goes to his own, not the adopted child's next of kin.¹¹ In Pennsylvania¹² and West Virginia,¹³ if the adopting parent have other children of his own, the adopted child inherits with, from, and through them as if born from the same parents; but in Rhode Island¹⁴ an adopted child is not entitled to inherit from lineal or collateral kin of the adopting parent by representation. The issue of an adopted child who died before the adopting parent inherit, on the death of the latter, in the degree of grandchildren;¹⁵ and while it was held in Iowa that grandchildren adopted by the maternal grandfather are entitled, on his death, after that of the mother, to the mother's share by representation in addition to their share as children by adoption,¹⁶ the conclusion was reached in Massachusetts, in a well-considered case, that an adopted child cannot take in such double capacity.¹⁷ In New Mexico, the statute expressly provides that an adopted child may be disinherited.¹⁸ It may be mentioned that a child adopted under the law of the adopter's domicil is entitled in any other State to which the child may remove with the adopter, to all the rights, including the inheritance of real estate

Extra-territorial effect of adoption.

¹ Gen. St. 1887, § 471 *et seq.*

² Property that came from the adopters: St. & C. St. 1885, ch. 4.

³ Code, 1882, § 1788.

⁴ McClain's St. 1888, § 3498 *et seq.*

⁵ Rev. St. 1884, p. 566.

⁶ In this State, the adopting parent must give bond if the adopted child has property: Code, 1883, § 1 *et seq.*

⁷ Wagner v. Varner, 50 Iowa, 532.

⁸ Gen. St. 1887, *supra*.

⁹ Rev. St. 1888, § 823.

¹⁰ Rev. St. 1890, § 3140.

¹¹ It seems to result from the cases *ubi*

supra that such is generally held to be the legal consequence of adoption in the absence of statutory regulation.

¹² Br. Purd. Dig. 1885. Adoption under this act, though retrospective in its operation, does not divest a vested right: *Bal-lard v. Ward*, 89 Pa. St. 358, 362.

¹³ Code, 1887.

¹⁴ Publ. St. 1882, ch. 164, § 7.

¹⁵ *Power v. Hafley*, 85 Ky. 671.

¹⁶ *Wagner v. Varner*, 50 Iowa, 532.

¹⁷ *Delano v. Bruerton*, 148 Mass. 619.

¹⁸ Comp. L. 1884, Tit. X. ch. 4, § 1083.

Most of the statutes, by providing that

from the adopter, secured to the child as a consequence of the adoption by the law of the domicil, if such law does not conflict with the *lex loci rei sitae*.¹ But the appointment of a testamentary guardian by an adopting father, in a State recognizing such appointment, does not operate to deprive the court of another State in which such child is domiciled, and where the appointment of testamentary guardians is not lawful, of jurisdiction to appoint another guardian.² And a statute contemplating that upon the decree of adoption the domicil of the adopting parents shall become the domicil of the adopted child was held not to apply to a case where the adopting parents were both domiciled in another State, and that the decree of adoption was of no legal effect in the foreign State.³ The effect of a joint adoption by husband and wife is held, in Indiana, to be, that the adopted child should be, in the eye of the law, as to all property rights, the child of the adoptive father by the adoptive mother.⁴ The compliance with the requirement of a statute providing for the filing of a transcript of the record of adoption in another State, is in no sense a re-adoption of such child, nor is the appearance of either of the adopters necessary, but the party adopted may at any time cause the record to be made, without the consent or presence of the adopting husband and wife.⁵

§ 12. **Status of Illegitimate Children.** — An illegitimate child, or bastard, known in the civil law as *patrem habere non intelligentur*⁶ and at the common law as *filius nullius*⁷ has according to the common law no inheritable blood and can therefore be the heir to neither his putative father, nor to his mother, nor to any one else; nor can he have heirs except of his own body.⁸ The rigor of this law, which allows a bastard no rights but such as he himself acquires,⁹ and accord-

Bastards incompetent to inherit at common law.

adopted children are put upon the level of legitimate children in regard to inheritance, have the same effect.

¹ *Van Matre v. Sankey*, 148 Ill. 536, 558; *Ross v. Ross*, 129 Mass. 243. It was held in this case, that there was no such conflict between the law of Pennsylvania requiring the consent of the adopter's wife to make the adoption valid, and that of Massachusetts, not providing for such consent, as would defeat the adopted child's right of inheritance to real estate on removing to Massachusetts.

² *Matter of Johnson*, 87 Iowa, 130, 133.

³ *Foster v. Waterman*, 124 Mass. 592.

⁴ *Markover v. Krauss*, 132 Ind. 294, 302.

⁵ *Markover v. Krauss*, *supra*.

⁶ 2 Kent, *212.

⁷ Per Taney, C. J., in *Brewer v. Blougher*, 14 Pet. 178, 198.

⁸ *Woerner on Adm.* § 75.

⁹ Even his name must be acquired by reputation: *Co. Litt.* 3.

Not legitimated by marriage of parents.

Severity of the common law relaxed in the United States.

Legitimation by subsequent marriage of parents.

Inherit from and through the mother.

Inherit from father if acknowledged by him.

ing to which legitimation by the marriage of the parents is not recognized,¹ has been greatly relaxed in the United States. Kent ascribes this relaxation of the severity of the common law to the recognition of the principle that the relation of parent and child, which exists in this unhappy case in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity.² The salient rights which are enjoyed by illegitimates under the law of most of the States over those accorded them by the common law consist in their legitimation by the marriage of their parents after the birth,³ cancelling all distinction between them and those begotten and born during lawful wedlock, and in their right of inheritance from and through the mother. In all other respects they are, even at common law, upon the same footing as legitimate children. Blackstone points out, that "any other distinction but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjust, and cruel to the last degree."⁴ Kent remarks that the rule that a bastard is *nullius filius* applies only to the case of inheritance, and that with this exception they are upon the same footing with legitimates.⁵ The right of illegitimate children to inherit from and through the mother is now secured to them by positive enactment in most of the States;⁶ in many of them they are enabled to inherit from the father, if he will acknowledge them in writing, in presence of a competent witness, or in such manner as may be pointed out by statute.⁷ That in very nearly all, if not all, the States, the marriage of the parents of illegitimate children legitimates them, has already been mentioned.⁸ The legitimacy imparted

¹ 1 Bla. Com. 454.

² 2 Kent, * 213.

³ At common law children born *during* wedlock are legitimate. "Our law is so indulgent," says Blackstone (1 Com. 455, 456), "as not to bastardize the child if it be born, though not begotten, in lawful wedlock."

⁴ 1 Bla. Com. 459. Schouler, in his famous work on Domestic Relations (§ 277), adds: "And so might the commentator of the commentaries stigmatize

the efforts of those who have nothing better to urge against human rights than the importance of preserving the symmetry of the law unimpaired."

⁵ "By the English law, as well as by the law of France, Spain, and Italy:" 2 Kent, * 214.

⁶ See enumeration of the States in Woerner on Adm. p. 156, note (8).

⁷ Woerner on Adm. p. 157, note (2).

⁸ *Ubi supra*.

to a child in any State according to the law thereof, as a general rule, follows the child everywhere and entitles him to the right of inheritance;¹ but in some of the States, following the English rule according to which real estate cannot be inherited by a bastard unless legitimated by the law of England,² this principle has been ignored.³

Legitimation follows child everywhere.

Except in some States as to inheritance of real estate.

The custody of illegitimate children is accorded, in most civilized nations, to the mother.⁴ Some doubt has been expressed whether at common law the mother possesses any exclusive privileges in this respect over the putative father;⁵ courts, it is said, refuse to interfere in favor of a mother against a father having the custody of his illegitimate child fairly and peaceably,⁶ but will restore matters as they were before where he obtained possession by force or fraud;⁷ and so if the child be of sufficient discretion to choose for itself, the court will allow no force to be used to compel it against its choice.⁸ But under the statutes of England⁹ and of most of the United States the putative father as well as the mother are liable for the support of their illegitimate offspring;¹⁰ and in the latter States, at least, the mother is entitled to the custody as against the father;¹¹ the

Custody of illegitimates mostly accorded to the mother.

Doubts as to the right of father at common law.

Child may choose, if of age of discretion.

Putative father, as well as mother, liable for support.

¹ *Dayton v. Adkisson*, 17 Atl. R. (N. J.) 964, citing English and American authorities; *Miller v. Miller*, 91 N. Y. 315; *Smith v. Kelly*, 23 Miss. 167, 170 (adopting the rule laid down by Story in his *Conflict of Laws*, ch. IV.); *Scott v. Key*, 11 La. An. 232, 236; *Ross v. Ross*, 129 Mass. 243, 245.

² *Birtwhistle v. Vardill*, 5 Barnw. & C. 438, 451 *et seq.* *In re Goodman's Trusts*, 17 L. R. 266, the decision of Jessel, M. R. (L. R. 14 Ch. D. 619), applying the same rule to personal property was reversed by two of the three judges trying the case on appeal.

³ *Lingen v. Lingen*, 45 Ala. 410, applying the disability in respect of personal as well as real property: *Smith v. Derr*, 34 Pa. St. 126. The hardship of this decision probably led, as suggested by V. C. Pitney, in *Dayton v. Adkisson*, *supra*, to the enactment of the statute of 1857, legitimating illegitimates by the marriage of their parents.

⁴ So under the Roman and Spanish law: *Acosta v. Robin*, 7 Mart. (N. S.) 387, 389; 2 Kent, 215, 216; Schoul. Dom. Rel. § 278 a.

⁵ *Strangeways v. Robinson*, 4 Taunt. 498, 509. But there are many dicta asserting the mother's exclusive right: *Wright v. Bennett*, 7 Ill. 587, 590; and see cases cited by Schouler, § 278, notes 4 *et seq.*

⁶ Per Lord Kenyon, C. J., in *Rex v. Mosely*, reported in a note to *King v. Manneville*, 5 East, 221, 223.

⁷ *Commonwealth v. Fee*, 6 S. & R. 255; *Rex v. Mosely*, *supra*.

⁸ *Re Lloyd*, 3 Mann. & Gr. 547.

⁹ 4 & 5 Wm. IV. c. 76, § 71; 7 & 8 Vict. c. 101.

¹⁰ 2 Kent, *215; Schoul. Dom. Rel. § 279.

¹¹ *Alfred v. McKay*, 36 Ga. 440, 441; *People v. Landt*, 2 Johns. 375; *Wright v. Wright*, 2 Mass. 109; *People v. Kling*, 6 Barb. 366, *Somerset v. Dighton*, 12 Mass.

putative father, however, is entitled against any other person.¹ In Alabama it has been held that the father of a bastard child, as such merely, has no right to its custody,² and in Texas that his right, after the child has reached the age of seven years, is equal to that of the mother.³ As in the case of legitimate children, the welfare of the child is the chief end to which the rights of the father, as well as of the mother, must yield.⁴

§ 13. **Legal Status of Persons in Loco Parentis.** — Upon the death of one or both parents, or in the cases of voluntary transfer or forfeiture of parental right before⁵ referred to, even during the life-time of the parents, the parental relation may be assumed by others toward infants, who are then said to stand to them *in loco parentis*, and to whom then attach all the rights and liabilities of parents.⁶ The *quasi* parental relation assumed by one who marries the mother of an infant does not of itself, in the absence of statutory provision to that effect, create the liability of a parent to support the step-child,⁷ nor entitle him to its services;⁸ but if he voluntarily assume the care and support of his step-child, the legal consequences of the relation of parent and child attach,⁹ chief among which are the cancellation of the ordinary presumption of a

383, 387; *Robalina v. Armstrong*, 15 Barb. 247; *Hudson v. Hill*, 8 N. H. 417; Per Randolph, J., in *State v. Stigall*, 22 N. J. L. 286, 288; *Bustamento v. Analla*, 1 N. M. 255, 261; *Re Doyle*, 1 Clarke, Ch. 154; *Copeland v. State*, 60 Ind. 394; *Pratt v. Nitz*, 48 Iowa, 33; *Adams v. Adams*, 50 Vt. 158, 161.

¹ *Pote's Appeal*, 106 Pa. St. 574, 581; *Commonwealth v. Anderson*, 1 Ashm. 55; *Barela v. Roberts*, 34 Tex. 554.

² *Matthews v. Hobbs*, 51 Ala. 210, 212.

³ *Byrne v. Love*, 14 Tex. 81, 95.

⁴ *State v. Noble*, 70 Iowa, 174; *Matter of Nofsinger*, 25 Mo. App. 116, 120.

⁵ *Ante*, § 7.

⁶ "A person who means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making provision for the child: *Brinkerhoff v. Merselis*, 24 N. J. L. 680, 683; *Wetherby v. Dixon*, 19 Ves. 407, 412.

⁷ *Williams v. Hutchinson*, 3 N. Y. 312; *Gerber v. Bauerline*, 17 Or. 115, 117; *Freto v. Brown*, 4 Mass. 675; *Worcester v. Marchant*, 14 Pick. 510, 512; *Brush v. Blanchard*, 18 Ill. 46; *McMahill v. McMahonill*, 113 Ill. 461, 466; *In re Besondy*, 32 Minn. 385, 387; *St. Ferdinand Academy v. Bobb*, 52 Mo. 357, 360; *Norton v. Ailor*, 11 Lea, 563, 566; *Maguinay v. Sandek*, 5 Sneed, 146, 148; *Brown's Appeal*, 112 Pa. St. 18, 25. That a widow is not legally bound to support her step-children is held in *Staal v. Grand Rapids*, 57 Mich. 239, 246.

⁸ *Gerber v. Bauerline*, *supra*; *Englehardt v. Yung*, 76 Ala. 534, 540, and cases *ubi supra*.

⁹ *Ela v. Brand*, 63 N. H. 14; *Dissenger's Case*, 39 N. J. Eq. 227, 229; *Smith v. Rogers*, 24 Kans. 140; *Gerdes v. Weiser*, 54 Iowa, 591, 593; and cases under notes *supra*.

promise by the child to pay for support received, or to the child for services it may render, so that there is no liability on either side without a promise to pay; and the assumption of the liability to third persons for necessities furnished the child in case of neglect by the person *in loco parentis*. The same result follows where one receives into his family and holds out as a member thereof, any infant relative, such as a grandchild, brother or sister, nephew or niece, etc., or even stranger.¹ The relationship between a father-in-law and son-in-law seems, however, to form an exception to this rule, and that the ordinary presumption to pay for services rendered or for board received is applicable to the dealings between them.² Whether the circumstances of a case are sufficient to rebut an applicable presumption, or to raise the presumption of a promise to pay where the law does not itself presume such promise, is always a question of fact to be decided by the jury, or found by the court.³ The test of liability of a person *in loco parentis* to third persons for necessities furnished in the education and support of a child, and of the liability of third persons in damages for the infraction of parental rights is, whether the child has been, and has been held out to the world to be, a member of his family.⁴ For the rights of a person *in loco parentis* in respect of the child are the same as in respect of his own issue, including the right of action for the loss of the child's services by seduction.⁵

Receiving and treating any child as a member of the family creates the parental rights and duties.

Except in case of a son-in-law.

Existence of the relation a question of fact.

Test of liability.

Persons *in loco parentis* may sue for infraction of parental rights.

¹ *Starkie v. Perry*, 71 Cal. 495, 497; *Hudson v. Lutz*, 5 Jones L. 217, 219; *Butler v. Slam*, 50 Pa. St. 456, 461; *Schrimpf v. Settegast*, 36 Tex. 296, 302; *Hays v. McConnell*, 42 Ind. 285; *Windland v. Deeds*, 44 Iowa, 98, 100; *Mobley v. Webb*, 83 Ala. 489; *Dodson v. McAdams*, 96 N. C. 149, 154; *Mulhern v. McDavitt*, 16 Gray, 404.

² *Wright v. Donnell*, 34 Tex. 291, 306; *Rogers v. Millard*, 44 Iowa, 466, 469; *Schoch v. Garrett*, 69 Pa. St. 144, 149; *Smith v. Milligan*, 43 Pa. St. 107, 109; *Amey's Appeal*, 49 Pa. St. 126.

³ *Smith v. Milligan*, *supra*; *Coe v. Wager*, 42 Mich. 49, 51.

⁴ *St. Ferdinand Academy v. Bobb*, 52

Mo. 357, 360; *Whitaker v. Warren*, 60 N. H. 20, 22 *et seq.*, citing numerous authorities on p. 23; *Mowbry v. Mowbry*, 64 Ill. 383, 387; *Moritz v. Garnhart*, 7 Watts, 302.

⁵ *Bracy v. Kibbe*, 31 Barb. 273, 275 (action by a stepfather); *Manvell v. Thomson*, 2 Carr. & P. 303 (action by an uncle); *Edmonson v. Machell*, 2 Term R. 4 (action by an aunt); *Irwin v. Dearman*, 11 East, 23 (action by one adopting the child); *Furman v. Van Sise*, 56 N. Y. 435, 438 (action by a mother after death of father); *Certwell v. Hoyt*, 6 Hun, 575 (action by a grandfather); *Davidson v. Abbott*, 52 Vt. 570 (action by mother, the father having abandoned his family).

In giving effect to a testator's disposition of his estate the question, whether he stood *in loco parentis* to his legatee sometimes arises, and the answer may be decisive of the grade, or even of the validity, of a bequest, as throwing light upon the testator's intention. Since the existence of, or the intention to assume, this relation is most readily inferred from the conduct and declarations of the party, parol evidence is held to be admissible of such acts and declarations in proceedings to construe a will.¹

Effect of standing in *loco parentis* on construction of a will. That a father cannot irrevocably divest himself of his duties toward and rights over his child, save as he may be thereto authorized by some statutory provision, has already been pointed out.² Public policy forbids, of course, any abnegation of the duties resting upon the parent; and in respect of parental rights, their transfer to others must be consistent with the welfare of the child, otherwise courts will, if the interest of the child is thereby enhanced, allow the parent to retract his consent that any other person have the custody.³ The power of the parent over the person of the child may be delegated to a tutor or instructor, the better to accomplish the purpose of education;⁴ so that a schoolmaster, standing *in loco parentis*, may, in proper cases, inflict moderate and reasonable chastisement.⁵

¹ Brinkerhoff v. Merselis, 24 N. J. L. 680, 683; Pym v. Lockyer, 5 Mylne & Cr. 29, 35 *et seq.*; Powys v. Mansfield, 6 Sim. 528.

² *Ante*, § 7, on the right of custody, § 10, on the law of adoption.

³ Schoul. Dom. Rel. § 251.

⁴ 2 Kent, *205.

⁵ State v. Pendergrass, 2 Dev. & B. 365.

CHAPTER III.

OF THE SEVERAL KINDS OF GUARDIANS OF MINORS.

§ 14. **Guardians of Minors at Common Law.** — Guardian, in the popular sense one who guards, preserves, or secures,¹ is the generic term applied, in legal usage, to a person whose right and duty it is to protect the rights, whether of the person or property, of some other person, his ward, who, as in the case of minors, is conclusively presumed, or, as in the case of idiots, lunatics, spendthrifts, &c., is adjudged to be incompetent to manage his affairs.² In respect to minors, the guardian of the person stands *in loco parentis*, thus giving rise to the designation, sometimes applied to them, of “temporary parents.”³

Definition of guardian.

Guardians as temporary parents.

Of the numerous kinds of guardians known in the common law,⁴ most of which have been abolished by statute,⁵ or become obsolete,⁶ it would be unprofitable to mention any, save three, which may be looked upon as originating some legal principles or rules which, although the guardianships themselves have fallen into disuse, or have, in most States, never existed, are still traceable in the American law touching guardians. These are (1) Guardianship by Nature, (2) Guardianship by Nurture, and (3) Guardianship by Socage.⁷

Guardians at Common Law.

The chief distinction between *Guardianship by Nature* and *Guardianship by Nurture* seems to lie in their duration; guardianship by nature extending throughout

Guardianship by Nature during minority;

¹ Webster.

² Rap. & L. Law D. See *ante*, § 1.

³ Tyler on Inf. p. 235; 1 Bla. 462; Sensemann's Appeal, 21 Pa. St. 331, 333.

⁴ Cranch, C. J., gives a list of them in *Munro v. Forrest*, 3 Cr. C. C. 147, 155 *et seq.*

⁵ The last vestige of the most oppressive form of guardianship that disgraced the common law of England, known as *Guardianship in Chivalry*, seems to have

been swept away, together with other burdensome servitudes incident to the feudal tenure, by the statute of 12 Car. II. c. 24, pl. 1, 2. See the remarks of Mr. Hargrave on this species of guardianship, *ante*, § 2.

⁶ Such as *Guardianship by Special Custom*, confined to certain localities, existing no longer: Schoul. Dom. Rel. § 284.

⁷ Tyler on Inf. § 163.

by Nurture until fourteen. the full period of minority,¹ while guardianship by nurture terminates when the child has reached the age of fourteen years ;² and that the former is strictly applicable only to the heir apparent (in contradistinction to the heir presumptive),³ the latter to younger children (not heirs apparent) ;⁴ neither of which points of distinction have any application in America. In other respects the rules applicable to one seem equally applicable to the other of these guardianships. The guardianship by nature devolves, without appointment from any court, primarily upon the father, and, in case of his death or unfitness, upon the mother.⁵ It seems to be in analogy with this rule that the mother who, in the absence of a father, supports a minor child, is entitled to its earnings.⁶ To the mother also belongs the guardianship by nature and nurture of an illegitimate child.⁷ But the authority of parents as guardians by nature extends only to the person of their child ; they have no power, as such, over property, whether real or personal.⁸ This species of guardianship is in effect only the right which the law accords to parents in respect of the custody of their children, their services and earnings ; hence a lease of the infant's land made by the father as natural guardian is simply void,⁹ and payment to him, and his acquittance therefor, of a legacy, distributive share, or any fund or property belonging to the child does not bind it.¹⁰

Guardianship by Socage exists, by the common law, in respect only of lands held in socage which the infant has acquired by

¹ 2 Kent, *219.

² 2 Kent, *221.

³ 2 Kent, *220.

⁴ 2 Kent, *221.

⁵ *Graham v. Houghtalin*, 30 N. J. L. 552, 566 ; *Fonda v. Van Horne*, 15 Wend. 631, 633 ; *Combs v. Jackson*, 2 Wend. 153, 156 ; *Kline v. Beebe*, 6 Conn. 494, 500.

⁶ *Matthewson v. Perry*, 37 Conn. 435, 437 ; *Hammond v. Corbett*, 50 N. H. 501.

⁷ *Wright v. Wright*, 2 Mass. 109 ; *Dalton v. State*, 6 Bradf. 357. See, on the mother's right to the custody of her illegitimate offspring, *ante*, § 12.

⁸ *Kendall v. Miller*, 9 Cal. 591 ; *Graham v. Houghtalin*, 30 N. J. L. 552, 566 ;

Haynie v. Hall, 5 Humph. 290, 293 ; *Mills v. Boyden*, 3 Pick. 217 ; and authorities, *infra*, notes 9, 10.

⁹ *May v. Calder*, 2 Mass. 55 ; *Darby v. Anderson*, 1 Nott. & McC. 369, 372 ; *Ross v. Cobb*, 9 Yerg. 463, 468.

¹⁰ *Genet v. Tallmadge*, 1 Johns. Ch. 3 ; s. c. *Ib.* 561, refusing to order money of the infant to be paid to his guardian, one of whose sureties had become insolvent : *Combs v. Jackson*, 2 Wend. 153, 156 ; *Hyde v. Stone*, 7 Wend. 354, 356 ; *Fonda v. Van Horne*, 15 Wend. 631 ; *Kline v. Beebe*, 6 Conn. 494 ; *Miles v. Kaigler*, 10 Yerg. 10, 16 ; *Williams v. Storrs*, 6 Johns. Ch. 353, 357 ; *Lang v. Pettus*, 11 Ala. 37.

descent. A peculiar feature attaches to this species of guardianship, which, as Kent observes, after Montesquieu, springs from a melancholy consciousness on the part of law-givers of the corruption of public morals;¹ it devolves to the infant's next of kin, to whom the inheritance cannot possibly descend.² But this rule has been repudiated as unreasonable, both in England³ and America.⁴ The guardian in socage has, after entry, the legal possession of the land to the use of the infant, to whom, when fourteen years of age, he is accountable;⁵ he takes not a naked authority, but an interest in the land so that he cannot be removed from office,⁶ enabling him to maintain trespass and ejectment, lease the land until the infant reach the age of fourteen, and make admittances of copyhold estates in his own name.⁷ This species of guardianship cannot arise except on the ownership of land held in socage descended to the infant; but it is said by Kent to extend, when it has arisen, not only to the person and all the socage estate, but to hereditaments which do not lie in tenure, and to the personal estate.⁸ It is a personal trust that cannot be assigned or devised, nor does it descend to the guardian's executor or administrator, but devolves on his death to the ward's next of kin Guardianship by socage goes only to next of kin who cannot inherit. Rights of guardians in socage. It devolves by law.

¹ 2 Kent, *224, citing Montesq. *Esprit des Lois*, liv. 19, c. 24.

² As where the estate descended from his father; in this case his uncle by the mother's side cannot possibly inherit, and therefore he shall be the guardian: 1 Bla. 462. Blackstone points out that the boast of the Romans, who held it to be "*summa prudentia*" to commit the care of the minor to him who is the next to succeed to the inheritance, gave Fortesquien and Sir Edward Coke ample opportunity for triumph; they affirming that to commit the custody of an infant to him that is next in succession is "*quasi agnum committere lupo ad devorandum*." The law of Solon was in this respect like the common law of England: 2 Kent, *223, citing Potter's Greek Antq. i. 174. Kent also points out that the law of Scotland and the ancient law of France took a middle course, wiser, perhaps, than either the civil or the common law, in committing the pupil's *estate* to the person entitled to the legal succession, because most inter-

ested in preserving it from waste, and excluding him from the custody of the *person*, because his interest is in opposition to the life of the pupil. *Ib.*, citing Erskine's Inst. 79; Hallam on the Middle Ages, i. 106.

³ *Dormer's Case*, 2 P. Wms. 262; *Ludlow, ex parte*, 2 P. Wms. 638.

⁴ *Livingstone, in re*, 1 Johns. Ch. 436.

⁵ *Osborn v. Carden*, Plowd. 293.

⁶ *Bedell v. Constable*, Vaughan, 177, 182.

⁷ *Wade v. Baker*, 1 Ld. Raym. 130, 131; *Rex v. Oakley*, 10 East, 491, 494; *Rex v. Sutton*, 3 Ad. & El. 597, 612; *Jackson v. De Walts*, 7 Johns. 157; *Hynes, in re*, 105 N. Y. 560, 563; *Sylvester v. Ralston*, 31 Barb. 286, 289.

⁸ 2 Kent, *223, citing note 67 to lib. 2 Co. Litt. Schouler, Dom. Rel. § 286, says that there is insufficient legal authority for such a supposition, but thinks it likely that the farm-stock and household chattels of the ward were included.

who cannot take the inheritance by descent. At the age of fourteen the child may elect a guardian of his own, and thus put an end to the authority of the guardian in socage ; but unless he does so, the guardianship in socage continues.¹

But ward, on reaching fourteen, may choose another guardian.

§ 15. *Statute, or Testamentary, Guardians in England.* — The statute abolishing the court of wards and liveries, wardships, forfeitures of marriages, &c., by reason of tenure from the king, or of any other knights-service, and effectually doing away with guardianship in chivalry,² instituted a new form of guardianship by enabling a father to dispose of the custody of his children during minority or for a lesser time. The name by which guardians so appointed are known — *Statute or Testamentary Guardians* — distinguishes them on the one hand from guardians at common law, because instituted by statute ;³ and on the other hand from guardians under judicial appointment, because they take their authority under appointment by the father.⁴ This power of the father might be exercised by him by deed or will, whether of full age or not, because before the Wills Act of Queen Victoria, a testator was not required to be of full age to make a valid will ; and since appointment of a guardian by deed was held to be a revocable act, not operative before the grantor's death,⁵ the deed was held to be but a testamentary paper, though in the form of a deed,⁶ from which it follows, as pointed out by Reeve,⁷ that the infant's ability to make a valid appointment of guardian is measured by his ability to make a will.⁸ Schouler⁹ calls attention to the dissent of Macpherson¹⁰ from this view of the law.

Guardians by deed or will are in England

called Statute or Testamentary Guardians.

Minor father may appoint under Statute Car. II.

¹ *Byrne v. Van Hoesen*, 5 Johns. 66.

² 12 Car. II. c. 24, § 8.

³ The statute of 4 & 5 P. & M., c. 8, authorized a father to appoint the custody of his daughters under the age of sixteen by will or other act in his life-time: *Ratcliff's Case*, 3 Rep. 37, 39. This statute was repealed by 9 Geo. IV. c. 31: *Macpherson*, Inf. p. 80. So that the mention of a statute guardian under English law is generally understood to refer to a guardian under the statute of Charles. Both of these statutes are held to be in force in Washington, D. C.: *Munro v. Forrest*, 3 Cr. C. C. 147, 158.

⁴ 1 Bla. 462.

⁵ *Shaftsbury v. Hannam*, Finch Rep. 323, 324; *Macpherson on Inf.* 83; *Reeve's Dom. Rel.* 391; *Schoul. Dom. Rel.* § 287; 2 Kent, *225.

⁶ *Ilchester, ex parte*, 7 Ves. 348, *367.

⁷ *Dom. Rel.* 391.

⁸ See *Morgan v. Hatchell*, 19 Beav. 86, 88, holding that the guardian is not disabled from being a witness to the execution of the deed, and doubting whether a witness is necessary.

⁹ *Dom. Rel.* § 287.

¹⁰ On Inf. p. 84: "These facts are adverse to the supposition, that the appointment of guardians under the statute is in its nature a testamentary act."

The present English law requiring testators to be of full age before they can execute a valid will¹ raises the important question in reference to the age of the grantor, whether an infant father can make a valid deed appointing a guardian; but the cases cited by Macpherson² do not appear to bear him out in his statement.

But not under 1 Vict., by will.

The statute creating testamentary guardianship originally excluded popish recusants from the office; and a later statute disables them to be "guardian of any child," or "capable of any legacy or deed of gift," or "to bear any office" without taking the oath prescribed in the act.³ To a still later act of Parliament,⁴ relieving persons willing to take and subscribe the oath therein set out from prosecution for recusancy, is ascribed the effect to remove the disqualification from a Catholic priest;⁵ and it is now said that all religious disabilities have been removed.⁶

Former religious incapacities now removed.

The power of a father to appoint extends to all his legitimate children under the age of twenty-one and unmarried at his decease, or born thereafter;⁷ but not to his illegitimate children.⁸ And the power is limited to the father; hence, the guardian so appointed cannot appoint another guardian;⁹ nor can the mother ap-

Father cannot appoint to illegitimate child.

Guardian cannot appoint; nor mother.

¹ 1 Vict. 29, § 7.

² *Lecome v. Sheises*, 1 Vern. 442, in which the court refuses to declare invalid the deed of a father granting guardianship of his children to a creditor, with a covenant not to revoke the appointment; *Lady Chester's Case*, Vent. 207, and *Gilliat v. Gilliat*, 3 Phillim. 222, both deciding that it is not the province of the spiritual, but of the temporal courts to decide whether the appointment of a guardian had been made in compliance with the statute. As to the first of these cases it is undoubtedly true that an irrevocable instrument cannot be a will; but in that particular the instrument under consideration is distinguishable from a deed not constituting a contract, but being a testamentary paper, just as a devise, made on a consideration, though in a valid will admitted to probate, is enforceable in equity as a contract. See *Woerner on Administration*, § 37, p. 58. As to the last two cases, it is to be remembered that the con-

struction of wills, as well as of contracts, belongs to the temporal and not to the spiritual courts; and that a will merely appointing a testamentary guardian need not be proved: 2 Kent, *225; which accounts for the lack of spiritual jurisdiction over the appointment of a guardian under deed or will without militating against its testamentary character.

³ 25 Car. II. c. 2, § 5.

⁴ 31 Geo. III. c. 32, §§ 8, 18.

⁵ 1 Cooley's Bl. *463, note (2).

⁶ *Corbet v. Tottenham*, 1 Ball & Bea. 59; *Villareal v. Mellish*, 2 Swanst. 533, 538; *Schoul. Dom. Rel.* § 287; *Byrnes, in re*, Irish R. 7 C. L. 199, 204.

⁷ *Ilchester, ex parte*, 7 Ves. 348, 366, 368 *et seq.*

⁸ *Ward v. St. Paul*, 2 Bro. C. C. 583; *Sleeman v. Wilson*, L. R. 13 Eq. 36, 41.

⁹ The trust being personal and not assignable: *Mellish v. De Costa*, 2 Atk. 14, with authorities; *Eyre v. Shaftsbury*, 2 P. Wms. 103, 122.

Nor grand-father.

point,¹ even to her illegitimate child;² nor a grandfather;³ but if either a father⁴ or, it seems, a mother, appoint a guardian to their illegitimate offspring, such person, if suitable and fit, will be appointed by the Court of Chancery.⁵

The statute directs that the guardianship shall continue until the child is twenty-one years of age, "or any lesser time." It

Testamentary guardianship may be for any time within minority, or until marriage of female ward.

One of several guardians dying, the others continue.

If all die or refuse to act, court appoints a guardian.

Guardian may be removed for misconduct, and another appointed.

Appointment must be in writing.

has been held that the marriage of a female ward terminates the guardianship,⁶ at least as to the custody of the person;⁷ but until the court enter a discharge of the guardian, it may continue to regulate his conduct.⁸ The guardianship of a male is

not terminated by his marriage.⁹ Where two or more are appointed testamentary guardians, and one dies or refuses to act, the others may qualify, or the survivors continue to be guardians until the ward's majority.¹⁰

But if the sole person appointed die, or refuse to take upon himself the office, the court having jurisdiction will appoint a guardian just as if no testamentary guardian had been appointed; and in such case the appointment will be made on petition; it is not necessary to file a bill for the purpose.¹¹ Where, however, a testamentary guardian has once

assumed the trust and acted as guardian, he may, if he misconduct himself, or become a lunatic or otherwise incapacitated, be removed by the Chancery Court on a bill brought,¹² and a new guardian will be appointed, or relief afforded by requiring security to hinder him from doing anything to the prejudice of the infant.¹³ No partic-

ular form of words is necessary for the appointment of a guardian under the statute, so that the father's intention is clearly manifested; but it must be in

¹ Villareal v. Mellish, 2 Swanst. 533, 536; Edwards, *ex parte*, 3 Atk. 519.

² Glover, *ex parte*, 1 Har. & W. 508, 510, citing authorities.

³ Blake v. Leigh, 1 Amb. 306; Fullerton v. Jackson, 5 Johns. Ch. 278.

⁴ Ward v. St. Paul, 2 Bro. C. C. 583.

⁵ Glover, *ex parte*, *supra*.

⁶ Mendes v. Mendes, 1 Ves. Sen. 89, 91; Brick's Estate, 15 Abb. Pr. 12, 14 *et seq*.

⁷ Macph. Inf. 90.

⁸ Roach v. Garvan, 1 Ves. Sen. 157, 160; Whitaker, *in re*, 4 Johns. Ch. 378.

⁹ Mendes v. Mendes, *supra*. See 2 Kent, * 226; Eyre v. Shaftsbury, 2 P. Wms. 103.

¹⁰ Eyre v. Shaftsbury, *supra*; Mellish v. Da Costa, 2 Atk. 13, 14; Kevan v. Waller, 11 Leigh, 414, 427.

¹¹ O'Keefe v. Casey, 1 Sch. & Lefr. 106; Salter, *ex parte*, 3 Bro. C. C. 500; Champney, *ex parte*, 1 Dick. 350.

¹² O'Keefe v. Casey, *supra*.

¹³ Tyler on Inf. 248; Roach v. Garvan, 1

writing,¹ and no proof *aliunde* the will should be admitted to show the testator's intention.²

Testamentary guardians, unless otherwise directed by the instrument of appointment,³ are entitled to the custody of the persons of their wards; and also to receive, for their use, the profits of all their lands, tenements, and hereditaments, as well as the collection and management of their personal property, and to bring such actions as guardians in socage might.⁴ This includes the power to make leases of the ward's lands; but the power is limited to leases terminating within the ward's minority.⁵ It has been held that a lease made by a testamentary guardian for a term exceeding the ward's minority, is not only voidable by the infant on attaining majority, but absolutely void, being the same as a lease made by a guardian in socage for a period exceeding the age of fourteen of a ward in socage.⁶

Rights of testamentary guardians.

§ 16. *Chancery Guardians under the English Law.* — Some difficulty attends the attempt to account for the origin of chancery jurisdiction to appoint guardians to minors.⁷ But we have seen⁸ that whatever may have been its origin, and whatever jurisdiction in this respect the Chancellor may have possessed before the statute creating the Court of Wards,⁹ no doubt now remains that upon the abolition of this court and of guardianship in chivalry, the jurisdiction over infants vested in the English equity courts.¹⁰

Jurisdiction of chancery over infants in England.

Recognizing the necessity of taking care of those who for the want of adequate will-power¹¹ cannot take care of themselves, or of their property, the Court of Chancery, representing the king in his quality as *parens patriæ*,¹² exercises large powers for the benefit of the young and helpless in the appointment and removal of guardians, in providing suitable maintenance, in award-

¹ *Dorsey v. Sheppard*, 12 Gill & J. 192, 199. *infants*, p. 95, referring to Co. Litt. 88 b, note (16).

² *Storke v. Storke*, 3 P. Wms. 51.

⁸ *Ante*, § 2.

³ For there may be an appointment of the custody of the person to one, and of the estate to another.

⁹ 12 Hen. VIII. c. 1.

⁴ See § 9 of the statute, 12 Car. II. c. 24.

¹⁰ See the statement of Lord Redesdale in *Wellesley v. Wellesley*, 2 Bligh (n. s.), 124, 128; and of Lord Eldon in *De Manneville v. De Manneville*, 10 Ves. 52, 53.

⁵ *Macph. Inf.* 91 *et seq.*; *Tyler, Inf.* 247.

⁶ *Roe v. Hodgson*, 2 Wils. 129 and 135.

¹¹ See *ante*, § 1.

⁷ See an elaborate essay on this point in *Macpherson's Treatise on the Law of In-*

¹² *Tyler on Inf.* § 171.

ing custody of the person, and in superintending the management and disposition of estates. It exerts a wholesome restraint in the ward's behalf by compelling trustees to give security, to invest under its direction, and to keep regular accounts, and protects the guardian against capricious attacks on the part of the ward by a sanction of his official acts.¹ Whenever a suit is brought for the direction of the court touching the estate or person of an infant, or for the administration of his property, the infant, whether plaintiff or defendant, becomes a

Wards in
chancery.

Court of Ex-
chequer also
appoints.

ward of the court.² So the Court of Chancery or the Court of Exchequer will appoint guardians to infants having neither father nor testamentary guardian, where a suit is pending affecting their interests;³ or the Court of Chancery will do so on petition alleging the existence of real or personal estate belonging to the infant, even if no suit is pending.⁴

The appointment of a chancery guardian is not, however, generally resorted to unless the child have property; the court

Chancery ap-
points only
when the
infant has
property.

refuses, not for the lack of jurisdiction to appoint, but for the want of the means to exercise its jurisdiction, by applying property to the use and maintenance of the infant, since the court cannot take on itself the maintenance of all impecunious children.⁵

So, where the consent of a guardian is necessary under the statute⁶ to enable an infant to marry that has neither father nor testamentary guardian, the court will refuse the appointment of a chancery guardian to such infant, but direct application to be made under the statute.⁷ It is mentioned by Macpherson,⁸ that persons desiring to place an infant under the protection of the Court of Chancery have resorted to the expedient of settling a small sum of money on him (deeming £100 sufficient for the purpose), and filing a bill for the due administration of the property. With the view of avoiding the heavy expense attending proceedings in chancery, the court sometimes appoints guardians to

¹ Schoul. Dom. Rel. § 288.

² Hughes v. Science, quoted by Macpherson in the Appendix to his work on Infancy from 6 Hill's manuscripts in Lincoln Inn Library, also cited in Butler v. Freeman, 1 Amb. 303.

³ Macph. Inf. 104.

⁴ But in such case it is said that the infant does not thereby become a ward of the court: Macph. on Inf. 104.

⁵ Wellesley v. Beaufort, 2 Russ. 1, 21.

⁶ 26 Geo. II. c. 33, § 12.

⁷ Becher, *ex parte*, 1 Bro. C. C. 556.

⁸ Inf. 103, 104.

infants having very small estates without bill on mere petition, and without the reference to a master usual in ordinary cases, requiring the guardians so appointed to give security to account.¹

The court does not interfere to appoint a guardian where one has already been properly appointed;² but it will control, and if necessary remove such as have been appointed improperly, or who misbehave or endanger the property of their wards, even though the guardian be the father,³ and will interfere not only to punish, but to prevent any abuse of the guardian's trust.⁴

Chancery will not appoint where there is a guardian, but will remove one, if necessary.

The appointment of chancery guardians by the Court of Chancery or the Court of Exchequer, should not be confounded with the power to appoint guardians *ad litem*, which inheres in every court for the protection of the rights and interests of infants when brought under their jurisdiction,⁵ unless duly represented by a competent guardian.⁶

Chancery guardians distinguishable from guardians *ad litem*.

The appointment of a guardian in chancery is, where a suit is pending, of the person only, because the estate is said to be under the direction of the court; but where no suit is pending, the appointment is of the person and estate.⁷ His duties and rights are the same, in regard to the person of the infant, as those of other guardians, and continue during minority. He cannot grant leases of his ward's lands without the sanction of the court. The death of one of several guardians appointed by the court determines the office as to all;⁸ but the survivors may in such case be appointed anew without reference to a master.⁹ On the marriage of a female guardian, it is a matter of course to appoint a new guardian,¹⁰ not

Duties and rights of chancery guardians.

Death of one terminates office of all.

On marriage of a female guardian, new guardian is appointed.

¹ So ordered where the property was an annuity of £15: Jones, *in re*, 1 Russ. 478; and where it was a freehold of the annual value of £80: Jackson, *ex parte*, 6 Sim. 212. The order to appoint without reference was refused where the value of the property was £1500: Wheeler, *ex parte*, 16 Ves. 266; and so in case of a rent charge of £150 per annum: 1 Jac. & Walk. 395.

² Reeve, Dom. Rel. 392.

³ Butler *v.* Freeman, 1 Amb. 301, and authorities cited, p. 302; Creuze *v.* Hunter, 2 Cox's Cas. 242.

⁴ Beaufort *v.* Berty, 1 P. Wms. 702, 705; Pendleton *v.* Mackrory, 2 Dick. 736; Wright *v.* Naylor, 5 Madd. 54.

⁵ Insurance Co. *v.* Bangs, 103 U. S. 435, 438. As to guardians *ad litem*, see *post*, § 21.

⁶ Colt *v.* Colt, 111 U. S. 566, 568.

⁷ Macph. 105.

⁸ Bradshaw *v.* Bradshaw, 1 Russ. 528.

⁹ Hall *v.* Jones, 2 Sim. 41.

¹⁰ Anonymous, 8 Sim. 346.

that because she is necessarily to be supplanted in the guardianship, — for she may be reappointed, — but because her fitness to be guardian under the new circumstances in which she has placed herself — being now under the control of her husband — should be passed upon by the court.¹ On this principle it would seem to follow that the marriage of a female, one of several guardians, would put an end to the whole guardianship.²

§ 17. **Guardians under Different Codes.** — Many of the principles of the civil law have come down to us as incorporated in the common law of England, prominently so in what is known as the equity branch of our jurisprudence. In view of this, and of some of its forms and names to be met with in the judicial systems of the several States, having percolated chiefly through the French, Spanish, and Dutch Codes with which some of them have come in contact, it is deemed worth while to notice some of its salient features touching the functions of guardians, and throwing light upon the origin of the various names by which guardians are known in the American States.

Story mentions, in his *Treatise on the Conflict of Laws*,³ that by the Roman Law guardianship was of two sorts, — (1) *Tutela*, which lasted until the infants reached the age of puberty, being fourteen in males and twelve in females; and (2) *Cura*, which lasted until full majority at the age of twenty-five. The guardian during tutelage was known as *tutor*, the ward as *pupil*; during the second period the guardian was called *curator*, and the ward *minor*. The term *curator* is, in America, said to have been borrowed from the civil law, and sometimes used to designate the person having charge of the infant's estate, in contradistinction to a guardian, who has charge of the person, or of both the person and estate.⁴ Macpherson divides guardianship under the civil law into three kinds: namely, what he terms, *tutela testamentaria*, conferred by testament; *tutela legitima*, conferred by the law without appointment; and *tutela dativa*, conferred by the authority of the judges.⁵

¹ Gornall, *in re*, 1 Beav. 347.

² Macph. 111.

³ § 493.

⁴ Senseman's Appeal, 21 Pa. St. 331,

333; *Duncan v. Crook*, 49 Mo. 116, 117; *Isaacs v. Taylor*, 3 Dana, 600.

⁵ Macph. 573. Schouler (*Dom. Rel.*

§ 292) adds that "these divisions have

Domat¹ explains that the French law differed from the Roman in continuing the tutorship until the persons have fully completed the age of five-and-twenty years. He points out a difference, also, in the preference given by the Roman law to certain persons, — nominees in the father's testament, or next of kin, — while in France the selection of a tutor is made by a *family council*, convoked, on the suggestions of any relative, by the summons of a justice of the peace to the next of kin, of the child; and they are not bound to appoint either the guardian named in the father's will, or the nearest relative.²

Under the Code Napoleon (promulgated in 1803), the father or surviving mother may, by last will or notarial declaration, appoint some relative, or even a stranger, to be guardian of his or her child. In default of such appointment the guardianship is assigned by law to the paternal, if none, to the maternal grandfather, or other male ancestor; and if there be none such, or two of equal propinquity, the nomination of a guardian is to be made by a *family council* of six or more of the nearest relatives and connections convoked by a justice of the peace.³ This family council appoints also a supplementary guardian, whose function consists in acting for the interests of the minor when they conflict with those of the guardian.⁴ The surviving mother is guardian of her children; but if she desires to keep the guardianship on remarrying, she must convoke a family council, who shall decide whether the guardianship ought to be continued to her, in default of which convocation she loses the guardianship entirely.⁵ If continued to her, the second husband must of necessity be joined as co-guardian with her.⁶

Under the Spanish law, which, as Macpherson asserts, is in most of these respects like the civil law,⁷ family councils are unknown, and a mother loses the tutory over her children on marrying a second time; but by a royal order she may, on her application, obtain a dispensation of the

their corresponding analogies in English and American law; since we may place testamentary guardians in the first class, socage and natural guardians in the second, and chancery and probate guardians in the third."

¹ Civil Law, § 1279 (Cushing's edition of Strahan's translation).

² Domat, § 1280.

³ Code Nap. b. i. tit. x. ch. ii. § 4.

⁴ Ib., b. i. tit. x. ch. ii. § 5.

⁵ Ib., Art. 395.

⁶ Ib., Art. 396.

⁷ Macph. 572.

legal prohibition.¹ The law of Mexico embodies the inhibition to the guardianship of a mother on her remarriage; and as the royal order authorizing the dispensation, to be made on the mother's application, was promulgated in Spain after Mexico had achieved independence, it never had operation there. Hence the order of an alcalde in California, before its annexation to the United States, continuing a mother as tutrix of her child after her remarriage, on the recommendation of a family council, was void.² The term "tutors" is retained in Louisiana to designate guardians of the persons and estates of infants;³ while the term "curator" is applied to the person having charge of the estate of an interdicted or absent person.⁴ An undertutor must be appointed by the judge whenever the letters of tutorship are certified for the tutor,⁵ who may resign at his pleasure,⁶ and cannot be compelled to accept the appointment.⁷

§ 18. **Chancery Guardians in the United States.**— It appears from a previous section⁸ that whatever may have been the nature and origin of the jurisdiction exercised by the Lord Chancellor of England over the persons and property of infants, it is quite certain that since the twelfth year of the reign of Charles II. such jurisdiction has been exercised as a branch of the equity powers of the Court of Chancery and the Court of Exchequer.⁹ Schouler, in his work on Domestic Relations,¹⁰ makes the statement that at the time when America was colonized, chancery guardianship was unknown in England, and that while the English Chancery Court was slowly extending its rights over the persons and estates of infants, another system was in process of growth on this side of the water, adapting itself to the increasing wants of our community, fostered, doubtless, by a strong prejudice against chancery practice with its expensiveness and prolixity of pleading. Whatever view may be taken of the historical accuracy of this assertion,

Origin of
Chancery
Jurisdiction
over infants
in America.

¹ *Braly v. Reese*, 51 Cal. 447, 457.

² *Braly v. Reese*, *supra*.

³ Rev. St. La. 1876, § 2348, forbidding the appointment of curators *ad bona* or *ad litem*.

⁴ Rev. St. La. 1876, § 1095 *et seq.*

⁵ Rev. Code, 1889, Art. 273.

⁶ *Undertutor of Walker*, 14 La. An. 631.

⁷ *State v. Judge of Probate*, 2 Rob. (La.) 418, 423.

⁸ § 16.

⁹ "The Court of Exchequer does exercise, like the Court of Chancery, a general power of appointing guardians and ordering maintenance for infants, where there is a suit pending:" *Macph. on Inf.* 102.

¹⁰ § 291.

it is certainly the prevalent conviction of lawyers, judges, and text-writers in America, that, in the absence of countervailing statutes, American courts having equity powers possess a general jurisdiction for the appointment of guardians in protection of infants, aside from the power, inherent in all courts before which the rights of infants are being litigated, of appointing guardians to such infants *ad litem*.¹ Story draws no distinction between the powers of English and American chancery courts in this respect,² and Pomeroy states that "this power to appoint guardians exists in the American States so far as it has not been taken away by statute."³ In some of the States whose statutes confer jurisdiction for the appointment of guardians to infants upon other tribunals, it is nevertheless held that the authority so conferred upon the other tribunals is simply cumulative, and that concurrent jurisdiction exists in them as well as in the courts of chancery. It is so held, for instance, in Alabama;⁴ and similarly in California,⁵ Indiana,⁶ Iowa,⁷ Maryland,⁸ Michigan,⁹ New York,¹⁰ Virginia,¹¹ and Wisconsin.¹² In Tennessee the statute, conferring jurisdiction to appoint guardians to minors on the county courts, expressly provides that "the powers of the Chancery Court over such estates are not hereby abridged;" and it is held that to the extent to which the statute conferred jurisdiction on the County Court it is concurrent with the Chancery Court; the use of the word "exclusive" in connection with the jurisdiction of the County Court was said to be "an inadvertence," or probably "a misprint;" and that the Court of Chancery is a superior court, possessing common law jurisdiction over infants and their estates in addition to the

Jurisdiction
concurrent in
chancery and
other tribunals.

¹ *Lake v. McDavitt*, 13 Lea, 26, citing earlier Tennessee cases, p. 30; *Waring v. Waring*, 2 Bland Ch. 673; *McCord v. Ochiltree*, 8 Blackf. 15; *Williamson v. Berry*, 8 How. (U. S.) 495, 555; *Board of Guardians v. Shutter*, 139 Ind. 268, 272.

² Eq. Jur. ch. xxxv.

³ Pomeroy's Equity Jurisprudence, § 1306, note (2); see also *Ib.*, §§ 1303-1309; *Field on Inf.* § 90; *Tyler on Inf.* § 171; and see cases cited, *infra*.

⁴ *Lee v. Lee*, 55 Ala. 590.

⁵ *Wilson v. Roach*, 4 Cal. 362, 366.

⁶ *Board of Guardians v. Shutter*, 139 Ind. 268.

⁷ *Harlin v. Stevenson*, 30 Iowa, 371, 376; *Sterritt v. Robinson*, 17 Iowa, 61. These cases do not arise on guardianship, but announce the rule of law that grant of jurisdiction to probate courts does not defeat the jurisdiction possessed by district courts (having in Iowa general equity jurisdiction).

⁸ *Corrie's Case*, 2 Bland Ch. 488.

⁹ *Taff v. Hosmer*, 14 Mich. 249, 256.

¹⁰ *Wilcox v. Wilcox*, 14 N. Y. 575, 578; cited in *Hubbard, in re*, 82 N. Y. 90, 92.

¹¹ *Durrett v. Davis*, 24 Gratt. 302, 315.

¹² *Glascott v. Warner*, 20 Wis. 654.

jurisdiction conferred by statute.¹ In Arkansas it is held doubtful whether the constitutional grant of jurisdiction over the persons and estates of minors to the probate courts divested the chancery courts of such jurisdiction or not.²

Mr. Schouler also points out the superior advantages possessed by chancery courts over probate courts in dealing with the persons and estates of infants, lunatics, and other persons incompetent to manage their affairs. "From the fact," he says, "that the English equity courts are unfettered in their authority, chancery courts in this country incline to the same direction; hence they construe strictly the powers of the probate courts, while maintaining their own; a matter of little difficulty, since the supreme authority is in their hands, whether in matters of probate, equity, or the common law."³ Thus Redfield, the author of a profound treatise on the Law and Practice of Surrogates' Courts in the State of New York, says: "It was held, in the early cases, that the guardian, whether appointed by the surrogate, or in any other way, is deemed an officer of the Supreme Court,⁴ within the rule that he may be summarily proceeded against by that court and removed, and compelled to account there; and that the surrogate had not concurrent jurisdiction with the Supreme Court to remove or change a guardian appointed by that court, or to compel such a guardian to account, either before or after removal."⁵

But notwithstanding the superior, unfettered powers of chancery courts over those of local tribunals, "maintained in derogation of the common law, made subject to supervision of supreme tribunals, and confined to the exercise of special powers sparingly conferred," as Schouler emphasizes,⁶ the jurisdiction to appoint guardians to minors and to control them in the administration of their property is now practically confined, in all the States, to the class of courts exercising testamentary jurisdiction. Guardians are now rarely appointed by chancery courts,⁷ and these will not take upon themselves the administration of the estates of wards after

¹ *Lake v. McDavitt*, 13 Lea, 26. But see *Webb v. Fritts*, 8 Baxt. 218, assuming exclusive jurisdiction in the County Court.

² *Shumard v. Phillips*, 53 Ark. 37, 45.

³ Dom. Rel. § 303 (p. 449).

⁴ Succeeding to the power and authority of the Chancellor on the 31st day

of December, 1846: Redf. Surr. (4th edition) p. 793.

⁵ Redf. Surr. 793. The same view is announced in *Cowls v. Cowls*, 8 Ill. 435.

⁶ Dom. Rel. p. 449 (4th ed.).

⁷ Schoul. Dom. Rel. § 303; Bispham, Principles of Equity, § 542; 2 Barnes' Kent (13th ed.), *226, note (1).

grant of letters, and thus supersede the Probate Court, except in extraordinary cases, and for special reasons,¹ although, as above mentioned, they still retain their jurisdiction in many cases, particularly where the testamentary courts are, for any reason, incompetent to accomplish full justice in controversies between guardian and ward. It is said that chancery will not interfere for the protection of an infant in any case where the remedy in the testamentary court is plain, adequate, and complete;² yet not nearly so strong a case is required in invoking the aid of chancery for an infant, as in an ordinary case of administration.³ There is, of course, beside the jurisdiction to appoint guardians as herein stated, jurisdiction in equity, in the United States as well as in England, over guardians, no matter how appointed, and whether statute or testamentary guardians, or guardians in socage, whenever they have made themselves liable as trustees; and over parties committing fraud upon infants, or making themselves liable as guardians *de son tort*,⁴ or constructive guardians.⁵

Jurisdiction of chancery over guardians liable as trustees and guardians *de son tort*.

§ 19. **The Natural Guardianship of Father and Mother under American Statutes.** — The rights of parents to the custody, education, and earnings of their children are pointed out in a former chapter;⁶ and it has also been mentioned⁷ that the common law guardianship *by Nature* and *by Nurture* are, in substantial effect, but the recognition of this natural right. This is literally so in the United States. In all of them the father is by statute recognized as the natural guardian of his legitimate children, without the necessity of judicial appointment or formality of any kind. His right is paramount to that of the mother, unless adjudged to be unfit or incompetent, in all the States except Iowa,⁸ Kansas,⁹ and Nebraska,¹⁰ in which the statutes entitle father and mother equally. The statutes of California¹¹ and Mon-

Right of father as natural guardian in the States.

Father and mother.

¹ Ames v. Ames, 148 Ill. 321, 344.

² Willis v. Fox, 25 Wis. 646, 648.

³ Horner, Co. Court Pract. § 390, citing, i. a. Lynch v. Rotan, 39 Ill. 14, 19.

⁴ Aldrich v. Willis, 55 Cal. 81, 85; Andrews, in re, 1 Johns. Ch. 99; Crumb, ex parte, 2 Johns. Ch. 439.

⁵ Hiestand v. Kuns, 8 Blackf. 345, 349; Grimes v. Wilson, 4 Blackf. 331, 335. And see post, § 24, on the subject of quasi or constructive guardians, or guardians *de*

son tort; also § 94, on the power of calling guardians to account.

⁶ Ante, §§ 7, 8.

⁷ Ante, § 14.

⁸ Code, 1888, § 3432. See State v. Kirkpatrick, 54 Iowa, 373, 375.

⁹ Gen. St. 1889, § 3217. See State v. Jones, 16 Kans. 608, 611.

¹⁰ Comp. St. 1891, ch. 34, § 6.

¹¹ Civil Code, 1885, § 246.

tana enact, what is generally adjudged to be the law without such statutory enactment,¹ that the mother is entitled in preference to the father while the child is of tender years.² If the father be dead or adjudged unfit, the mother, unless she be herself unfit, is in most States recognized as the natural guardian of her minor children. Exception is made to this rule in Alabama, where her right is limited to female children, and to males under the age of fourteen.³ A statute authorizing the appointment of guardians to all minors "who have no father, guardian, or master," was held, in Connecticut, to deprive the mother of her right to the custody of her children as natural guardian against a guardian appointed by the Probate Court.⁴ The mother's right as natural guardian of her children on the father's death is limited to the time during which she remains unmarried in California,⁵ Louisiana,⁶ Maine,⁷ Vermont,⁸ and Wisconsin.⁹ In Maryland it has been decided, that although the mother becomes the natural guardian of her infant children by the death of their father, and has the right to the control of their persons and property, to the exclusion of all other persons, yet she must qualify and give bond as required by statute of all guardians; and that if she fail to do so within a reasonable time, the Orphan's Court must appoint a guardian in her place, though she makes no formal renouncement of her right.¹⁰

That the mother is treated, in this country, as the natural guardian of her illegitimate offspring, results from what has been mentioned in a previous section concerning illegitimate children.¹¹ Also, that parties adopting children thereby acquire the rights and

¹ See *ante*, § 7.

² Codes & St. 1895, Civ. C. § 340, pl. 2.

³ Code, 1887, § 2372.

⁴ *Macready v. Wilcox*, 33 Conn. 321, 327, citing former Connecticut cases. The present statute, however, substitutes the word "parent" for "father," and omits "master:" Gen. St. Conn. 1887, § 454. It was held, in an early case, "that the mother, upon the death of the father, was the natural guardian of her female children until they should arrive to the age of discretion for choosing a guardian:" *Fields v. Law*, 2 Root, 320, 323.

⁵ Code Civ. Proc. 1885, § 1751.

⁶ Civ. Code, 1889, Art. 254. But if she convoke a family council before her re-marriage, and submit to them the question whether she be retained as tutrix, the family council may so determine. Her second husband must, if she be continued as tutrix, be joined with her as co-tutor: *Ib.*, Art. 255.

⁷ Rev. St. 1883, ch. 67, § 3.

⁸ Rev. L. 1880, § 2422. In the statutes of Vermont of 1894, this condition is omitted: § 2737.

⁹ Rev. St. 1878, § 3964.

¹⁰ *Lefever v. Lefever*, 6 Md. 472, 476.

¹¹ *Ante*, § 12.

assume the duties of parents, and are hence the natural guardians of such adopted children.¹ Parental rights, to some extent, accrue, with corresponding duties, to all who assume a status *in loco parentis* to infants; hence, to that extent, such persons may be considered as their natural guardians.² So grandparents have been held the natural guardians of orphan infants residing with them, so as to affect the domicil of the latter.³ In strictness, however, none but the natural parents can be guardians by nature;⁴ next of kin succeed, on the death of the parents, to such authority only as may be involved in their status *in loco parentis*.

The common law rule giving to the guardian by nature power over the person only, and not over the property of the ward,⁵ is enacted by statute in most of the States; and where not so enacted, it is of binding authority in every State recognizing the common law. Hence, where a statute gives to parents, as natural guardians, the custody and care of the persons, education, and *estates* of their children, and directs that when such estate is not derived from the parent acting as guardian, such parent shall give security and account as other guardians, the parent so acting has no right to control or dispose of the property of his child derived from any other person than himself, until he has given the bond required by the statute of all guardians.⁶ A petition by an infant must show that the plaintiff is an infant, and sues by guardian or next friend, who has given bond and security according to law, or it is bad on demurrer.⁷ But the father, as natural guardian, may sue for and recover personal property of his minor son which came to the son through himself.⁸

Authority of natural guardians over property of their children conditioned on giving bond.

§ 20. **Testamentary Guardians in the United States.** — In England, testamentary guardians, that is to say, guardians appointed by deed or will of a father under authority of the Statute of 12

¹ *Ante*, § 10.

² *Ante*, § 13.

³ *Lamar v. Micon*, 114 U. S. 218, 222; *Darden v. Wyatt*, 15 Ga. 414; *Matter of Benton*, 60 N. W. (Iowa) 614.

⁴ *Schoul. Dom. Rel.* § 298; 1 Bla. 461; 2 Kent, *220.

⁵ See *ante*, § 14.

⁶ *McCarty v. Rountree*, 19 Mo. 345, 348; *Sherwood v. Neal*, 41 Mo. App. 416,

423; *Shanks v. Seamonds*, 24 Iowa, 131, 132; *Spruance v. Darlington*, 30 A. (Dela.) 663.

⁷ *Higgins v. Haun. R. R.*, 36 Mo. 418, 431; *Spillane v. Mo. Pac. Ry. Co.*, 111 Mo. 555, 561.

⁸ In such case he should describe himself as guardian: *Rhoades v. McNulty*, 52 Mo. App. 301, 306.

Distinction ?
between testa-
mentary and
other guar-
dians in
America.

Car. II., are frequently designated as *statute* guardians, which term is there sufficient to distinguish them¹ from chancery guardians and the various kinds of guardians at common law.² It would be inaccurate to refer to a testamentary guardian by the term *statute*, or *statutory* guardian in the United States, because here all classes of guardians, including in a general sense even natural guardians and guardians *ad litem*, chancery guardians and *a fortiori* the guardians appointed by courts having probate jurisdiction,³ derive their authority from some statute or constitutional provision.

The substantial elements of the Statute of Charles II. have been re-enacted in most of the States. The right to the testamentary disposition of the custody, maintenance, and education of his unmarried infant children is recognized to be in an adult father, or one competent to make a will, in all the States, either by direct enactment, or by recognizing the Statute of 12 Car. II. ch. 24, as being in force.⁴

Power of in-
fant fathers.

In many of them the authority is expressly conferred on infant fathers; so, for instance, in Mississippi,⁵ New Jersey,⁶ New York,⁷ North Carolina, and in such other States in which the statutes have more or less fully adopted the language of the Statute of Charles II. In many instances the power can be exercised by will only, as in Alabama,⁸ Arkansas,⁹ Connecticut,¹⁰ Georgia,¹¹ Illinois,¹² Michi-

¹ The statute of 4 & 5 P. & M., ch. 8, repealed by 9 Geo. IV. ch. 31, gave a very limited authority, and could not have reference to a general guardian: *Ante*, § 15, p. 42, note (3).

² As to testamentary guardians in England, see *ante*, § 15.

³ And which are therefore sometimes called *probate* guardians by text-writers: Schoul. Dom. Rel. § 291.

⁴ In Maryland the mother is enabled to appoint a guardian to her infant children by statute (Civ. Code, 1878, Art. 72, pl. 11); and it is held that the father of an illegitimate child has no such power: *Ramsay v. Thompson*, 71 Md. 315, 318; and that under the statute of 12 Car. II. ch. 24, a written will is indispensable to the appointment of a testamentary guardian: *Dorsey v. Sheppard*, 12 Gill & J.

192, 199; from which it appears that the power of the father to appoint a guardian of a legitimate child is assumed.

The statute is held to be in force in New Hampshire: *Balch v. Smith*, 12 N. H. 437, 440, relying on *Noyes v. Barber*, 4 N. H. 406, 408, in which the statute was assumed to be binding in New Hampshire; *Copp v. Copp*, 20 N. H. 284, 286. So in the District of Columbia (as well as the statute of 4 & 5 P. & M. ch. 8): *Mauro v. Ritchie*, 3 Cr. Ct. Ct. 147, 163.

⁵ Code, 1880, § 2095.

⁶ Rev. 1877, p. 464, § 1.

⁷ Banks & Bro. (8th ed.) 2612, § 1.

⁸ *Desribes v. Wilmer*, 69 Ala. 25, 28.

⁹ Dig. 1884, § 3471.

¹⁰ Gen. St. 1887.

¹¹ Code, 1882, § 1804.

¹² St. & Curt. St. 1885, ch. 64, ¶ 3.

gan,¹ Minnesota,² Missouri,³ Nebraska,⁴ Nevada,⁵ Ohio,⁶ Oregon,⁷ Rhode Island,⁸ Pennsylvania,⁹ Vermont,¹⁰ Virginia,¹¹ West Virginia¹², and Wisconsin.¹³ The will ^{Must be in writing.} must usually be in writing,¹⁴ and the person that is to have the custody of the infant must be pointed out, although the word guardian need not be mentioned.¹⁵ Appointment of one as administrator *cum testamento annexo* by the Probate Court confers no authority as testamentary guardian.¹⁶ But where it is made the duty of executors to expend a portion of the estate for the support and education of the testator's minor children, as trustees, it has been held that they were thereby made in effect testamentary guardians, and, that the court had no power, while they faithfully discharged this duty, to order them to pay over any moneys to the statutory guardians;¹⁷ and although a father is not constituted guardian by such testamentary provision, yet he may manage the estate as trustee without being required to give bond as such, or as guardian.¹⁸ The authority ^{Authority from will alone.} of the guardian dates from the probate of the will, where no further qualification is imposed by statute,¹⁹ while in many States it is required that the testamentary guardian qualify by taking the oath and giving the bond, as other guar- ^{Qualifying necessary.} dians.²⁰ In the other States the power may be exer-

¹ Gen. St. 1890, § 6311.

² Gen. St. 1891, § 5742.

³ Rev. St. 1889, § 5283.

⁴ Comp. St. 1891, ch. 34, § 11.

⁵ Gen. St. 1885, § 558.

⁶ Rev. St. 1890, § 6267.

⁷ Code, 1887, § 2885.

⁸ Publ. St. 1882, ch. 168, § 1.

⁹ Br. Purd. Dig. p. 513, §§ 31, 32.

¹⁰ Rev. St. 1894, § 2748.

¹¹ Code, 1887, § 2597.

¹² Code, 1891, ch. 82, § 1.

¹³ Sess. L. 1887, ch. 201, § 1.

¹⁴ *Dorsey v. Sheppard*, 12 Gill & J. 192, 199.

¹⁵ *Desribes v. Wilmer*, *supra*; *Corrigan v. Kiernan*, 1 Bradf. 208; *Peyton v. Smith*, 2 Dev. & B. Eq. 325, 346.

¹⁶ *Dunham v. Hatcher*, 31 Ala. 483, 486.

¹⁷ *Capps v. Hickman*, 97 Ill. 429, 436, *Dickey, C. J.*, dissenting on the ground that the executors had not the right of guardians under the will: p. 438.

¹⁸ *Camp v. Pittman*, 90 N. C. 615, 617.

¹⁹ Held, in California, that there is no necessity to issue letters of guardianship to a testamentary guardian; his authority emanates directly from the will: *Norris v. Harris*, 15 Cal. 226, 256. So, it seems, the statute of Colorado provides: *Mills' St.* 1891, § 2091. In Kentucky, testamentary guardians are liable like trustees in equity only, and are not required to make annual settlements in the Probate Court like other guardians: *Maupin v. Dulaney*, 5 Dana, 589. In Florida, the authority of the testamentary guardian emanates directly from the will, but extends only to the custody of the person; as guardian of the estate he must be appointed by the court: *Thomas v. Williams*, 9 Fla. 289, 296 *et seq.* In Georgia, the general rule is that they are not required to give bond and security: *Southern Marble Co. v. Stegall*, 90 Ga. 236.

²⁰ If the guardian appointed fails to qualify, it is the duty of the court to appoint some other person as guardian:

cised, as under the English statute, by deed or will.¹ An instrument executed with the formalities necessary to a will, and in-

tended as such, does not become a deed by the mere affixing of a seal which is not necessary to the will.²

Right may be
forfeited if not
claimed.

The right to the testamentary guardianship must be claimed within six months from the probate of the will or is lost, in Alabama,³ Arkansas,⁴ Missouri,⁵ Virginia,⁶ and West Virginia.⁷ In Mississippi, the requirement of the statute that the person nominated as testamentary guardian shall "appear before the Probate Court . . . and declare his acceptance of the guardianship," is held to be sufficiently complied with to make him liable as testamentary guardian by the nominee's petition for the probate of the will, in which he shows that he is not required to give bond either as executor or guardian.⁸ There is a statement

Will appoint-
ing must be
proved.

in Kent's Commentaries that a will merely appointing a testamentary guardian need not be proved.⁹ This statement should, at the present time, be received with caution, for in most States wills have no validity until they are admitted to probate; and in at least some of the States a will appointing a testamentary guardian is expressly required by statute to be admitted to probate before it is valid.¹⁰

The greatest and most significant departure from the English statute is found, in the United States, in the consideration extended to the rights and feelings of the mother. Under it, as heretofore shown, and in those States in which its provisions in this respect have not been altered, the mother was not only

Davidson v. Koehler, 76 Ind. 398, 417; to same effect, Wadsworth v. Connell, 104 Ill. 369, 375; McAlister v. Olmstead, 1 Humph. 210, 226. In New York, the person appointed guardian must, within thirty days after probate of the will, appear and qualify, otherwise he is deemed to have renounced the appointment, unless the surrogate extend the time, which he may, for good cause shown, not exceeding three months: Throop's Ann. Code C. Proced. 1887, § 2852. This law applies only to wills proved after September 1, 1880: Geoghegan v. Foley, 5 Redf. 501.

¹ In Louisiana, by will or notarial declaration: Civ. Code, 1889, Art. 257. In Mississippi, by writing or will: Code, 1880,

§ 2095. In Texas, by will or written declaration: 1 Rev. Civ. St. 1888, Art. 2497.

² Wuesthoff v. Germania Co., 107 N. Y. 580, 591.

³ Code Civ. 1887, § 2373.

⁴ Dig. St. 1884, § 3473.

⁵ Rev. St. 1889, § 5284.

⁶ Code, 1887, § 2598.

⁷ Code, 1887, ch. 82, § 2.

⁸ Gregory v. Field, 63 Miss. 323, 325.

⁹ 2 Kent, *225.

¹⁰ Texas Rev. St. 1888, § 2486; Throop's Ann. St. of N. Y., 1887, § 2851. This law also requires the acknowledgment, certificate, and recording of a deed appointing a guardian. See also, to same effect, Wardwell v. Wardwell, 9 Allen, 518.

disabled from appointing a testamentary guardian herself,¹ but the father might, by the appointment of a testamentary guardian, deprive her of the custody and care of her offspring, no matter how tender their years, or how great their need of maternal attention; for the authority of the testamentary guardian was paramount, to the exclusion of any right in the mother.² "It is true," says Lord, J.,³ "that in some of the States, of late years, the injustice to which it subjected mothers provoked a revolt in public sentiment, and resulted in legislation which has softened its rigors, or so materially changed its features as to place the parents comparatively upon an equality in the right of the custody of children. And while the spirit of modern progress has characterized our legislation, leading to the removal of numerous disabilities created by the common law, and to a recognition of her individuality and of her rights of property, and what is equally, or more sacred to her, the right to direct and control the training and custody of her offspring, in case of divorce where the husband is in fault, or shown in any controversy between them to be an unfit custodian of them, yet this relic of barbarism, in the form of a statute, is still in force in our own State . . ." (Deciding that under the statute of Oregon the provision of the English statute is still in force, disabling a mother from appointing a testamentary guardian for her children.)

Power of father to exclude mother from custody of her children.

Still existing in some States.

The mother's right is recognized by statute in granting the power to appoint testamentary guardians to *the surviving parent* in Arkansas,⁴ Idaho,⁵ Illinois,⁶ Kansas,⁷ Louisiana,⁸ Nebraska,⁹ Ohio,¹⁰ and West Virginia.¹¹ The authority of the father to appoint a guardian is conditioned upon *consent of the mother* in presence of two witnesses in New Jersey,¹² and

States in which the mother may appoint testamentary guardian.

Where she must consent to the father's appointing.

¹ Bell, *ex parte*, 2 Tenn. Ch. 327; Pierce, *in re*, 12 How. Pr. 532; Turner, *in re*, 19 N. J. Eq. 433, 436.

² Talbot v. Shrewsbury, 4 Myl. & Cr. 672, 683; see *ante*, § 15, for further English cases.

³ In Ingalls v. Campbell, 18 Oreg. 461, 464.

⁴ Dig. St. 1884, § 3421.

⁵ Rev. St. 1887, § 5781.

⁶ St. & Curt. St. 1885, ch. 64, ¶ 5.

⁷ Gen. St. 1889, § 3218.

⁸ Code Civ. 1889, Art. 257.

⁹ Comp. St. 1891, ch. 34, § 11.

¹⁰ If father is dead, or has gone to parts unknown: Rev. St. 1889, § 6266.

¹¹ Code, 1891, ch. 82, § 1.

¹² Rev. 1877, p. 464, § 1. The statute of 12 Car. II. ch. 24, was formerly held to be in force in this State, under which the right of the testamentary guardian to the custody of his ward was held to prevail over that of the mother: Van Houten, *in re*, 3 N. J. Eq. 220, 226.

upon her consent in writing, in California,¹ Idaho,² Montana,³ North Dakota and South Dakota.⁴ The mother is expressly

Mother's right
on father's
death.

authorized to appoint guardians to her infant children by will, if the father died without making the appointment, in Colorado,⁵ Massachusetts,⁶ Nevada,⁷ and North Carolina.⁸ In Connecticut the appointment of a guardian may be made by the will of any party that was entitled to the custody of the child while living;⁹ while in Georgia such appointment may be made by the mother on the father's death, and also as to the personal property inherited from her.¹⁰ In Illinois, the father is authorized to appoint by will, but cannot deprive the mother of the custody of her infant children while she lives.¹¹ In Maryland, the appointment of a testamentary guardian by a mother is valid.¹² In Michigan, the mother may object to the guardian appointed by the father's will, and the court decides between her and the appointee.¹³ In Missouri¹⁴ and Texas,¹⁵ the appointment can only be made by a lawful parent when the other lawful parent is dead. In New York, by a late amendment of the Revised Statutes,¹⁶ the father and the mother are made the joint guardians of their minor children, repealing the former authority of the father to appoint a testamentary guardian during the lifetime of the mother, and only the surviving parent is authorized to appoint such a guardian. It is held under this statute that the attempted appointment by the father during the lifetime of the mother is void, and cannot be validated by the mother's subsequent assent.¹⁷

In Pennsylvania¹⁸ and Rhode Island,¹⁹ testamentary guardians may be appointed by any parent competent to make a will.

¹ Civ. Code, 1885.

² Rev. St. 1887, § 5781.

³ St. 1895, C. C. § 335.

⁴ Comp. L. Terr. 1887, re-enacted for South Dakota Sess. L. 1890, ch. 105; Rev. C. North D. 1895, § 2812.

⁵ Gen. St. 1891, § 2090.

⁶ Publ. St. 1882, ch. 139, § 5.

⁷ Gen. St. 1885, § 558.

⁸ Code, 1883, § 1562.

⁹ Gen. St. 1887.

¹⁰ Code, 1882, § 1805; Taylor v. Jeter, 33 Ga. 195, 199.

¹¹ St. & Curt. St. 1885, ch. 62, ¶ 5. And where the custody of children is given to the mother in a divorce suit, she may by will appoint a guardian for such child: Wilkinson v. Deming, 80 Ill. 342.

¹² Rev. Code, 1878, Art. 52, pl. 11.

¹³ Rev. St. 1890, § 6311.

¹⁴ Rev. St. 1889, § 5283.

¹⁵ McKinney v. Noble, 37 Tex. 731.

¹⁶ Laws, 1893, ch. 175.

¹⁷ In re Schmidt, 28 N. Y. Supp. 350. The statute of 1862, requiring the mother's consent to the testamentary appointment by the father, had been held to be repealed by the statute of 1871, ch. 32: Fitzgerald, in re, 61 How. Pr. 59, following Thomson v. Thomson, 55 How. Pr. 494. See also, Matter of Zwickert, 26 N. Y. Supp. 773.

¹⁸ Br. Purd. Dig. 1883, p. 513, § 31.

¹⁹ Pub. St. 1882, ch. 163, § 9 (except married women).

Except by the recognition of the mother's right, as above mentioned, the class of persons authorized to appoint testamentary guardians has not been enlarged. As under the English statute, so under the various American statutes, no person is authorized to appoint a testamentary guardian to any but his own children.¹ Where a testator appoints a testamentary guardian for his grandchild, the appointee becomes a trustee for the grandchild, and holds the property devised as such, and not as guardian.² But one may annex to a devise in favor of an infant the condition that the rents and profits thereof be expended by a particular person and in a particular manner pointed out; and in such case neither the guardian appointed by the court, nor any other person, will have the right to interfere.³ Yet it is held that such a gift, coupled with the appointment of the father of the infant to be his guardian without bond, "for the purpose of receiving and managing the property so given," is void.⁴ Nor can a father appoint a guardian for his illegitimate child. This is in most States inhibited by statute, either, as is most frequently the case, by limiting the power of the father to legitimate, or lawful, children; or by limiting the power to appoint for illegitimates to the mother, as in California,⁵ Idaho,⁶ Louisiana,⁷ Montana,⁸ North Dakota and South Dakota.⁹ Where the statute contains no express provision on this subject, the father's incapacity to appoint a guardian for his illegitimate child results from the common law principle that a bastard is *nullius filius*, and that the word "child" intends "lawful child."¹⁰ It is held in Louisiana that one who was authorized to adopt a child by act of legislature has no authority to appoint a testamentary guardian to such adopted minor to the exclusion of the natural father.¹¹

None but
parents can
appoint.

Father cannot
appoint to
illegitimate
child.

As in England,¹² so in the United States, no particular language

¹ Hoyt v. Hilton, 2 Edw. Ch. 202, 203; Williamson v. Jordan, Busb. Eq. 46; Camp v. Pittman, 90 N. C. 615, 617.

² Grimsley v. Grimley, 79 Ga. 397, 406.

³ Vanartsdalen v. Same, 14 Pa. St. 384, 387; Fullerton v. Jackson, 5 Johns. Ch. 278; Bush v. Bush, 2 Duv. 269, 271; Camp v. Pittman, 90 N. C. 615, 617.

⁴ Brigham v. Wheeler, 8 Metc. (Mass.) 127.

⁵ Civ. Code, 1885, § 241.

⁶ Rev. St. 1887, § 5781.

⁷ Civ. Code, 1867, Art. 274.

⁸ Comp. St. 1888, Prob. Pract. Act, § 414.

⁹ Comp. L. Terr. 1887, ch. 105.

¹⁰ Sleeman v. Wilson, L. R. 13 Eq. 36; Blacklaws v. Milne, 82 Ill. 505. This principle, as appears from an earlier section, also excludes the mother's power: Ante, § 15, referring to Glover, ex parte, 1 Har. & W. 508.

¹¹ Upton, in re, 16 La. An. 175.

¹² See ante, § 15.

is necessary to constitute a testamentary guardian, either by will or deed, if the father's intention is clearly apparent. Where the statute employs the words "custody and tuition," in reference to the children, such assignment of them as confers, either expressly or by clear implication, a power extending thereto is sufficient.¹ But although no form of words is prescribed for the appointment of a testamentary guardian, yet the words employed, to raise the implication, must be such as to convey the necessary powers.²

It may be said, in a general way, that testamentary guardians are governed, as to their duties and powers, their rights and liabilities, by the same law as other guardians. This is mostly expressed in the statutes themselves. In a number of States they may be relieved of the necessity to give bond with sureties, by request of the testator appointing them.³ In some States the minor

is not permitted, on reaching the age of fourteen, to choose another guardian in place of the testamentary guardian,⁴ as he is permitted to do where the appointment is by the court. In Kentucky, testamentary guardians are liable like trustees, and are not required to settle with the Probate Court like other guardians.⁵ In Louisiana, the family council and judge may reject the testator's nominee and substitute another guardian.⁶ In Nevada, it is provided that testamentary guardians have the same powers as those appointed by the court, "except as modified or enlarged

by the will."⁷ It is held that where two or more testamentary guardians are appointed in a will, the office is joint and several, and either, or any one or more, may qualify without the others, and without notice to or renouncement by the other or others.⁸ Where there is a legally appointed guardian in office, one appointed by will is not entitled to letters, and it is not necessary to annul the testamentary appointment to continue the former in office.⁹

¹ *Corrigan v. Kiernan*, 1 Bradf. 208, citing numerous English cases: *Kevan v. Waller*, 11 Leigh, 414, 427 *et seq.*

² *Gaines v. Spaun*, 2 Brock. 81, 88.

³ These States will be more particularly pointed out hereafter, in connection with the subject of guardians' bonds. See *post*, § 39.

⁴ So, for instance, in Arkansas, California, Delaware, Missouri, Ohio, Texas, and probably other States.

⁵ *Maupin v. Dulaney*, 5 Dana, 589.

⁶ C. C. 1867, Art. 279.

⁷ Gen. St. 1885, § 558.

⁸ *Kevan v. Waller*, 11 Leigh, 414; *Reynolds, in re*, 11 Hun, 41.

⁹ *Potts v. Terry*, 28 S. W. (Tex.) 122.

§ 21. **Special Guardians: Guardian ad Litem and Prochein Ami.**

— Since minors are presumed wanting in discretion to manage their own causes, or to appoint and instruct attorneys,¹ or agents,² they can neither prosecute³ nor defend,⁴ in person or by attorney; hence, it becomes the duty of courts, in order to preserve their property from destruction or waste, to appoint a guardian to take care of it pending the proceedings,⁵ if no duly authorized person appears for them.⁶ A judgment cannot properly be rendered against an infant who has no probate guardian or guardian *ad litem*, although his parents in fact represent him at the trial, and by the aid of counsel defend the action against him on his behalf.⁷ One who acts for an infant plaintiff is usually known as *prochein ami* (a term employed in the original statutes, enabling infants to sue otherwise than by guardian)⁸ or next friend, and is admitted by the court to prosecute for an infant, because otherwise the infant might be prejudiced by the refusal or neglect of his guardian.⁹ The person representing an infant defendant is called a guardian *ad litem*, because appointed by the court to look after the interests of an infant when his property is involved in litigation.¹⁰

Minors can neither prosecute nor defend without next friend or guardian,

Prochein Ami.

Guardian *ad litem.*

¹ Wilford v. Grant, Kirby, 114, 116. See Lang v. Belloff, 31 Atl. (N. J. Eq.) 604.

² Holden v. Curry, 85 Wis. 504, 510.

³ Miles v. Boyden, 3 Pick. 213, 218; McGiffin v. Stout, 1 N. J. L. 92; Mockey v. Grey, 2 Johns. 192; neither consent on the part of the adult defendant, nor the deposit of security for costs, will obviate the necessity of a next friend or guardian: Sutton v. Nichols, 20 Kans. 43.

⁴ Nicholson v. Wilborn, 13 Ga. 467, 472; Timmons v. Timmons, 6 Ind. 8; McIntosh v. Atkinson, 63 Ala. 241; Kesler v. Penninger, 59 Ill. 134; Wetherill v. Harris, 67 Ind. 452, 472; Gamache v. Prevost, 71 Mo. 84; Bedell v. Lewis, 4 J. J. Marsh. 562, 567; Fall River Co. v. Doty, 42 Vt. 412, 416; Alderman v. Tirrell, 8 Johns. 418.

⁵ Insurance Co. v. Bangs, 103 U. S. 435, 438; Morris v. Edwards, 43 Ark. 427; Lehew v. Brummel, 103 Mo. 546, 553.

⁶ Colt v. Colt, 111 U. S. 566, 578; Winston v. McLendon, 43 Miss. 254, 258; Wells v. Smith, 44 Miss. 296, 303; Man-

sur v. Pratt, 101 Mass. 60; Neenan v. City, 28 S. W. (Mo.) 963; Hocker v. Montague, 29 S. W. (Ky.) 874.

⁷ Johnson v. Waterhouse, 152 Mass. 585; Brown v. Downing, 137 Pa. St. 569, 573.

⁸ Westminster 1 (3 Edw. I. ch. 48) and Westminster 2 (13 Edw. I. ch. 15). Before these statutes, infants could only sue by guardian; they were enacted to enable wards or any of their friends to bring actions against their guardians for feoffment made of the ward's lands. A *prochein ami* is usually the nearest relation; but as the nearest relation may be an unsuitable person, the court will permit any other person to institute the suit on the infant's behalf as next friend: Burwell v. Corbin, 1 Rand. 131, 151.

⁹ Anderson Dic. "*Ami prochein*:" Apthorp v. Backus, Kirby, 407, 409.

¹⁰ Anderson Dic.: "*Guardian ad litem*, An infant sues by his 'next friend,' and defends by his guardian *ad litem*:" *Ib.*, "*Friend—next*." See Sharp v. Findley, 59 Ga. 722, 729.

Difference
between next
friend and
guardian
ad litem.

There is little or no difference between the functions of a next friend and of a guardian *ad litem*, save that one of these names is usually given when they represent one, and the other when they represent the other side to the litigation; both are officers of the court, and under the control of the court; they are a species of attorney, whose duty it is to bring the rights of the infant to the notice of the court.¹ In some States the functionary representing an infant plaintiff is also designated as a guardian *ad litem*.²

Power to
appoint such
inherent in
all courts.

The power to appoint a *prochein ami*, like the power to appoint a guardian *ad litem*, is inherent in every court, including justices of the peace,³ when the interest of a minor requires it; and while in theory the appointment is a necessary prerequisite,⁴ yet in practice it is sufficient if the appointment is recited in the count, and the formality is generally waived.⁵ At all events, the defendant can take advantage of the defect by demurrer on answer only, not by motion in arrest; the court may appoint a next friend after judgment.⁶ So on plea in abatement to a suit by an infant in person, the court may allow him to amend by inserting in his writ the name of a next friend;⁷ and a judgment in favor of an infant has been held valid, although the petition averred neither infancy nor consent of next friend, under a statute requiring consent to be in writing before process shall issue in the name of an infant sole plaintiff.⁸

¹ Tucker v. Dabbs, 12 Heisk. 18, 20; Simmons v. Baynard, 30 Fed. Rep. 532, 534; Cates v. Pickett, 97 N. C. 21, 26; Isaacs v. Boyd, 5 Port. 388, 393.

² So by statute in California: Crawford v. Neal, 56 Cal. 321; Minnesota: Bryant v. Livermore, 20 Minn. 313, 343; New York: Segelken v. Meyer, 94 N. Y. 473; Rima v. Rossie, I. W., 120 N. Y. 433, 438; Texas: Bond v. Dillard, 50 Tex. 302, 309; Wisconsin: Straka v. Lander, 60 Wis. 115, 117; and see Brooke v. Clark, 57 Tex. 105, holding that although it is irregular to bring suit for a minor by next friend, without the appointment of a special guardian, yet judgment for the minor will not, for that reason, be reversed on appeal, if the objection was not made below. To like effect Wygal v. Meyers, 76 Tex. 598, 603.

³ Mockey v. Grey, 2 Johns. 192.

⁴ So held in Wilder v. Ember, 12 Wend. 191; Haines v. Oatman, 2 Dong. 430.

⁵ Schoul. Dom. Rel. § 450; Bethea v. McCall, 3 Ala. 449, 451; Hooks v. Smith, 18 Ala. 338, 340; Miles v. Boyden, 3 Pick. 213, 218; Judson v. Blanchard, 3 Conn. 579, 584; Barwick v. Rackley, 45 Ala. 215, 218, holding that the consent of neither the minor nor of the court is necessary before the beginning of the suit; Gulf Railway v. Styron, 66 Tex. 421, 425; Klaus v. State, 54 Miss. 644, 646; Stumps v. Kelley, 22 Ill. 140.

⁶ Jones v. Steele, 36 Mo. 324; Albert v. State, 66 Md. 325, 332; Rima v. Rossie, I. W., 120 N. Y. 433, 440; Cronter v. Cronter, 133 N. Y. 55, 63.

⁷ Blood v. Harrington, 8 Pick. 552, 555.

⁸ Dodd v. Moore, 91 Ind. 522. See also Evans v. Collier, 79 Ga. 319, holding that judgment in favor of an infant cures all

And where an infant brings a suit in person and reaches majority pending the same, no amendment or appearance by guardian or next friend is necessary after majority.¹ So the court may permit one who comes of age pending a trial to join in the suit as a co-plaintiff,² and a decree rendered against one who was of age at the time of its rendition, although the suit was instituted while he was a minor, is not collaterally assailable on the ground of the defendant's infancy, and if not set aside in a direct proceeding, is binding on the defendant, if the court had jurisdiction.³

An infant may sue by next friend although he have a guardian, whether such guardian assent or not,⁴ *a fortiori* where the guardian has left the country, or failed in his duty to preserve the rights of his ward,⁵ or where the action is against the guardian.⁶

The next friend must be a real, not a fictitious person;⁷ his powers are not limited to defence, objection, and opposition merely, but he may file a cross-bill to protect the infant's interest, and appeal from a decree dismissing same;⁸ and he may, if the interest of the minor requires it, be removed, and the suit suspended,⁹ or another appointed in his place.¹⁰ So the court will interfere to prevent the jeopardy of the infant's rights, if the suit is not for his benefit,¹¹ and will not permit any person, whether guardian or next friend, who has an interest in the action hostile to the infant, to conduct it in his behalf.¹² But it is held in Washington that guardians may, in partition proceedings, admit facts prejudicial to formerly asserted claims of their infant wards.¹³

The necessity of appointing a guardian *ad litem* to defend for a minor in an action against him, as already mentioned,¹⁴ was held

defects in failing to have a *prochein ami* or guardian. Also *Holton v. Towner*, 81 Mo. 360, 367.

¹ *Woodman v. Rowe*, 59 N. H. 453; *Shuttlesworth v. Hughey*, 6 Rich. 329.

² And objection thereto is absolutely frivolous: *Robinson v. Hood*, 67 Mo. 660.

³ *Thain v. Rudisill*, 126 Ind. 272, 280.

⁴ *Thomas v. Dike*, 11 Vt. 273, 275; *Segelken v. Meyer*, 94 N. Y. 473, 479.

⁵ *Robson v. Osborn*, 13 Tex. 298, 306; *Poullain v. Poullain*, 76 Ga. 420, 449; *Peterson v. Bailiff*, 52 Minn. 386, 388.

⁶ *Apthorp v. Backus*, Kirby, 407, 409; *Clement v. Ramsey*, 4 S. W. (Ky.) 311.

⁷ *Bullard v. Spoor*, 2 Cow. 430.

⁸ *Sprague v. Beamer*, 45 Ill. App. 17, 18.

⁹ *Guild v. Cranston*, 8 Cush. 506; *Chudley v. Railway Co.*, 51 Ill. App. 491, 497.

¹⁰ *Martin v. Weyman*, 26 Tex. 460, 468; *Barwick v. Rackley*, 45 Ala. 215, 219; *Fulton v. Roosevelt*, 1 Pai. 178; *Mills v. Humes*, 22 Md. 346, 357.

¹¹ *Ball v. Miller*, 59 Iowa, 634 (authorized by statute).

¹² *George v. High*, 85 N. C. 113; *Walker v. Crowder*, 2 Ired. Eq. 478, 488; *Patterson v. Pullman*, 104 Ill. 80, 87.

¹³ *Kromer v. Friday*, 10 Wash. 621, 636.

¹⁴ *Supra*, p. 63.

Guardian *ad litem* for an infant suing by next friend. in Arkansas to extend to a counterclaim filed against an infant in a suit prosecuted for him by a next friend; for the infant plaintiff thereby becomes an infant defendant and reply should be made for him by a guardian *ad litem*.¹

But the Supreme Court of the United States held the principle, announced by the Supreme Court of Illinois, that a plaintiff, against whom a cross-bill is filed, is in court, and no process is necessary to bring in the parties to the original bill, applicable to infants, if the cross-bill is germane to the original suit.² A judgment against an infant after service of summons upon him, without the appointment of a guardian *ad litem*, is erroneous, though not void.³ While in most States, there need be no guardian *ad litem* if the infant have a probate or other authorized guardian competent to act,⁴ there should be such appointment if the interests of the guardian and ward conflict,⁵ or if the regular

Or where interest of guardian and ward conflict. guardian, though summoned, fails to appear,⁶ or where the statute requires infants to be defended by guardian *ad litem*.⁷ And though a non-resident guardian is

competent to maintain a suit in behalf of his non-resident ward, yet the appointment of a guardian *ad litem* in the appellate court, in a case prosecuted below by such non-resident guardian, is valid.⁸ So it is held that a guardian *ad litem* should be appointed

On distribution of an estate. for infant distributees on the final settlement of an estate, and where this is required by statute, the omission avoids the decree;⁹ but such appointment is not necessary if the infant distributee has a regularly appointed guar-

¹ *Morris v. Edmonds*, 43 Ark. 427. So objection to a plea interposed for an infant defendant by next friend was held well taken: *Bush v. Linthicum*, 59 Md. 344, 356.

² *Kingsbury v. Buckner*, 134 U. S. 650, 675.

³ *Eisenmenger v. Murphy*, 43 N. W. (Minn.) 784.

⁴ Per Dewey, J., in *Swan v. Horton*, 14 Gray, 179; *Mansur v. Pratt*, 101 Mass. 60; *McMakin v. Stratton*, 82 Ky. 226, holding it error, under the statute, to appoint a guardian *ad litem* for an infant having a statutory guardian; *Hughes v. Sellers*, 34 Ind. 337, 340; *Emeric v. Alvaredo*, 64 Cal. 529, 597; *Scott v. Porter*, 2 Lea, 224;

Robinson v. Hood, 67 Mo. 660; *Smoot v. Boyd*, 87 Ky. 642, 646; *Shelby v. Harrison*, 84 Ky. 144, 147; it is the duty of the general guardian to appear for his ward: *Western Co. v. Phillips*, 94 Cal. 54.

⁵ See *supra*, p. 65, note 12; per Hoar, J., in *Mansur v. Pratt*, *supra*; *Parker v. Lincoln*, 12 Mass. 17; *Stinson v. Pickering*, 70 Me. 273; *Prince v. Clark*, 81 Mich. 167, 169; *James v. Meyer*, 41 La. An. 1100.

⁶ *Woodall v. Delatour*, 43 Ark. 521, 524; *Lloyd v. Kirkwood*, 112 Ill. 329, 340.

⁷ *Bearinger v. Pelton*, 78 Mich. 109 113.

⁸ *Hyndman v. Stowe*, 9 Utah, 23, 30.

⁹ *Searcy v. Holmes*, 43 Ala. 608, citing earlier Alabama cases; *Cason v. Cason* 31 Miss. 578, 595.

dian representing him.¹ It is held, however, that in proceedings to foreclose, the general guardian does not represent his ward, but a guardian *ad litem* must be appointed for that purpose.²

The appointment of a guardian *ad litem* cannot be properly made until after the infant is brought into court by the regular service of process;³ or, in the absence of statutory regulation, on appearance by a solicitor;⁴ service, however, is sometimes presumed, in a collateral proceeding, where the record shows the appointment of a guardian *ad litem*,⁵ but not on error or appeal.⁶ Judgment without notice is void,⁷ or voidable,⁸ as judgment where there was notice, but no guardian.⁹ Neither the guardian nor the infant can waive the service of process;¹⁰ but the judgment on such waiver is not void, but irregular,¹¹ like judgment against an infant without guardian *ad litem*, which may, in some States, be set aside after the infant's majority,¹² or the judgment may stand if not prejudicial to the infant.¹³ Care should be taken to comply with the statute in bringing infants into court, which is in some States by

Service of process necessary to appointment of guardian *ad litem*.

¹ *Hatcher v. Dillard*, 70 Ala. 343, 346; *Jones v. Fellows*, 58 Ala. 343, 346.

² *Sheahan v. Judge*, 42 Mich. 69.

³ *Cook v. Rogers*, 64 Ala. 406, 409, holding appointment before service of notice on the infant (which in Alabama must, for infants under fourteen, be on the parents or protectors) to be irregular and reversible and citing earlier cases; *Moore v. Prince*, 5 Tex. Civ. App. 352; *Freeman v. Russell*, 40 Ark. 56; *Johnston v. San Francisco*, 63 Cal. 554, 557; *Gibbons v. McDermott*, 19 Fla. 852; *Smith v. Reid*, 134 N. Y. 568, 572; *Clark v. Thompson*, 47 Ill. 25, 28; *Carver v. Carver*, 64 Ind. 194; *Good v. Norley*, 28 Iowa, 188, 198; *Claypoole v. Houston*, 12 Kans. 324, 327; *Coleman v. Coleman*, 3 Dana, 398, 405; *Allsmiller v. Freutchenicht*, 86 Ky. 198, 204; *Nagel v. Schilling*, 14 Mo. App. 576; *Shaw v. Gregoire*, 41 Mo. 407, 411; *Erwin v. Carson*, 54 Miss. 282; *Larkins v. Bulard*, 88 N. C. 35; *Potter v. Ogden*, 136 N. Y. 384, 392; *Ingersoll v. Mangam*, 84 N. Y. 622, 625; *Moore v. Starks*, 1 Oh. St. 369; *Moore v. Gidney*, 75 N. C. 34, 38; *Riker v. Vaughan*, 23 S. C. 187; *Linnville v. Darby*, 1 Baxt. 306, 310; *Helms v. Chadbourne*, 45 Wis. 60, 69.

⁴ *Sloane v. Martin*, 24 N. Y. Supp. 661, 689.

⁵ *Brackenridge v. Dawson*, 7 Ind. 383, 385; *Wood v. Martin*, 66 Barb. 241.

⁶ *Martin v. Starr*, 7 Ind. 224.

⁷ *Dohms v. Mann*, 76 Iowa, 723, 727.

⁸ *Dillon v. Howe*, 98 Mich. 168, 169.

⁹ *Charley v. Kelley*, 120 Mo. 134, 143.

¹⁰ *Pugh v. Pugh*, 9 Ind. 132, 135; *Whitesides v. Barber*, 24 S. C. 373, 376; *McClosky v. Sweeney*, 66 Cal. 53; *Kansas City Co. v. Campbell*, 62 Mo. 585, 588; *Wheeler v. Ahrenbeak*, 54 Tex. 535.

¹¹ *Thompson v. Doe*, 8 Blackf. 336; *Cates v. Pickett*, 97 N. C. 21, 26, reciting that before the Code it was the general practice in North Carolina to appoint a guardian *ad litem* for minor heirs on the petition of an administrator for an order to sell land; *Walkenhorst v. Lewis*, 24 Kans. 420, 427.

¹² *Richards v. Richards*, 10 Bush, 617 (if prejudicial to the infant); *Powell v. Gott*, 13 Mo. 458, 461; and see collections of cases on this point by Wagner, J., in *Townsend v. Cox*, 45 Mo. 401, 404.

¹³ *Wickersham v. Timmons*, 49 Iowa, 267.

serving process upon the infant in person, and also upon his parents or those standing *in loco parentis*,¹ or on the latter alone,² or on non-resident infants, as on non-resident adults, by publication.³ Where the number and names of infant heirs are unknown, there can be no appointment of guardians.⁴

The power to appoint a guardian *ad litem* is, as already mentioned,⁵ incident to every court.⁶ If the defendant fails to move the appointment, when necessary, the court will appoint on motion of the plaintiff,⁷ or, for the protection of the infant, without such motion.⁸

Thus, where a minor's general guardian has objected to the account of the administrator of an estate in which the ward is interested, and is removed pending a reference of the trial on such objections, it is the duty of the judge to appoint a special guardian to protect the rights of the infant upon the accounting, without the notice to the infant required by

or without motion, statute for the appointment of a special guardian on the application of a person other than the infant;

and the authority of the special guardian so appointed is not revoked by the subsequent appointment of another general guardian.⁹ And where the guardian *ad litem* of an infant against whom judgment has been rendered fails for

many years to carry up the case for review, a writ of error may be prosecuted in behalf of such infant by his next friend.¹⁰ It is held to be within the discretion of the court to permit an amend-

ment, after suit begun, by appointing a guardian *ad litem*;¹¹ but such appointment will not be made after judgment rendered, where the attention of the court

¹ *Ingersoll v. Ingersoll*, 42 Miss. 155, 162; *Frank v. Webb*, 67 Miss. 462, 467; *Helms v. Chadbourne*, 45 Wis. 60, 67; *Ingersoll v. Mangam*, 84 N. Y. 622, 625.

² *Irwin v. Irwin*, 57 Ala. 614 (if under fourteen); *Strayer v. Long*, 83 Va. 715, 720 (notice to the guardian).

³ *Bryan v. Kennett*, 113 U. S. 179, 194.

⁴ *Kountz v. Davis*, 34 Ark. 590, 597.

⁵ *Supra*, p. 64.

⁶ *Clarke v. Gilmanton*, 12 N. H. 515, 518; 3 Bla. 427; 2 Kent, *229.

⁷ *Mace v. Scott*, 17 Abb. N. C. 100; *Clarke v. Gilmanton*, *supra*; *Jack v. Davis*, 92 Ga. 219; *Peak v. Shasted*, 21 Ill. 137;

Ontario Bank v. Strong, 2 Pai. 301; *Concklin v. Hall*, 2 Barb. Ch. 136, 138.

But the plaintiff is not bound to move for the appointment, and the failure to do so does not work a discontinuance: *Turner v. Douglass*, 72 N. C. 127, 132.

⁸ *Loyd v. Malone*, 23 Ill. 43, 47; *Morris v. Gentry*, 89 N. C. 248, 254; *Rhoads v. Rhoads*, 43 Ill. 239, 247.

⁹ *In re Monell*, 19 N. Y. S. 361.

¹⁰ *Carlton v. Miller*, 2 Tex. Civ. App. R. 619, 622.

¹¹ *Boyce v. Lake*, 17 S. C. 481 (case of a lunatic); *Waples v. Waples*, 3 Houston, 458.

has not been called to the necessity for such an order before.¹ Where the record fails to disclose the infancy of a defendant, and in the absence of such fact appearing in any manner, the order appointing a guardian *ad litem* has no effect upon the rights of any person, and is a mere nullity.²

As the interest of a guardian adverse to that of his ward makes it improper for the guardian to represent his ward in the litigation affecting such interests,³ so the guardian *ad litem* appointed should be one having no interests adverse to the minor.⁴ Hence, neither the plaintiff's husband⁵ nor attorney⁶ should be appointed; nor the master who is to take an account in which the infant is interested;⁷ nor should the appointment be made by the adverse party.⁸ But fraud cannot be inferred from the appointment of a sister of the complainant, who is the stepmother of the infant,⁹ and it is proper to appoint as guardian *ad litem*, to recover the infant's property, the infant's general guardian.¹⁰ The appointment of a next friend or guardian should, it has been said,¹¹ be made upon proper application in writing, and due consideration, by the court; not upon simple suggestion. Where the common law disabilities of married women are removed by statute, there is no good reason why a married woman should not be permitted to act as next friend.¹²

§ 22. Functions of Next Friends and Guardians *ad Litem*. — Neither the next friend,¹³ nor the guardian *ad litem*,¹⁴ is a party to the suit; it is carried on in the name of the infant in either case. In England¹⁵ and in most

No one having adverse interest to be appointed.

General guardian may be appointed.

Next friend and guardian *ad litem* not parties to suit.

¹ Kuhn v. Kilmer, 16 Neb. 699, 702 (also case of a lunatic).

² Sullivan v. Sullivan, 42 Ill. 315, 318; Carter v. Ingraham, 43 Ala. 78; Rhett v. Mastin, 43 Ala. 86.

³ *Supra*, p. 65, note 12.

⁴ Damouth v. Klock, 29 Mich. 289, 297; Wilson v. Houston, 76 N. C. 375; Frits, *in re*, 2 Pai. 374, 376; Grant v. Van Schoonhoven, 9 Pai. 255, 256.

⁵ Bicknell v. Bicknell, 111 Mass. 265.

⁶ Sargeant v. Rowsey, 89 Mo. 617, 623. But this principle is not applicable to an attorney of the plaintiff in other suits: Walters v. Hermann, 99 Mo. 529, 532.

⁷ Walker v. Hallett, 1 Ala. 379, 390.

⁸ Rhoads v. Rhoads, 43 Ill. 239, 248; Knickerbacker v. De Freest, 2 Pai. 304, 305.

⁹ Stevenson v. Kurtz, 98 Mich. 493, 495.

¹⁰ Straka v. Lander, 60 Wis. 115.

¹¹ Per Merriman, J., in Morris v. Gentry, 89 N. C. 248, 254.

¹² Budd v. Rutherford, 4 Ind. App. 386, 388.

¹³ Anonymous, 2 Hill (N. Y.), 417, 418; Brown v. Hull, 16 Vt. 673, 676; Bryant v. Livermore, 20 Minn. 313, 342; Sanborn v. Phillips, 68 Me. 431, 432.

¹⁴ Bryant v. Livermore, 20 Minn. 313, 342.

¹⁵ Schoul. Dom. Rel. § 450; Stephenson v. Stephenson, 3 Hayw. 123, 125, citing English authorities.

Prochein ami
liable for costs,

of the American States the *prochein ami* is himself liable for the costs,¹ but in others he is not.²

The guardian *ad litem* is not liable for costs;³ but the person at whose instance he was appointed may be taxed with the

but not the
guardian *ad*
litem.

charges and expenses in defending the infant, as was held under a statute of Illinois;⁴ but it is otherwise

if there is no statute to such effect.⁵ No bond is required of a

Bond.

prochein ami, unless there be a statute to that effect;⁶

¹ *Stephenson v. Stephenson*, *supra*, holding that the rule originates in the protection extended by the court to infants, "the court will permit the suit to be brought without the consent or even the knowledge of the infant, only holding over the bringer of the suit the check of costs:" p. 124 *et seq.*; *Perryman v. Burgster*, 6 Port. 99, 107; *Albert v. State*, 66 Md. 325, 332; *Sproule v. Botts*, 5 J. J. Marsh. 162; *Kleffel v. Bullock*, 8 Neb. 336, 342; per *Burnside, J.*, *arguendo*, in *Heft v. McGill*, 3 Pa. St. 256, 264; *Ennis v. Waller*, 3 Blackf. 472; *Cargle v. Railroad Co.*, 7 Lea, 717, holding that neither an infant nor a next friend can sue *in forma pauperis*: *Rima v. Rossie I. W.*, 120 N. Y. 433, 438; *Kingsbury v. Buckner*, 134 U. S. 650; *Galveston Oil Co. v. Thompson*, 76 Tex. 235, 239. One having a personal interest in the result of the suit will *a fortiori* be held liable for costs: *Critenden v. Canfield*, 87 Mich. 152, 160. Where the statute requires the written consent of a next friend to act, and security for costs, it is sufficient if such consent be filed after service of process: *Greenman v. Cohee*, 61 Ind. 201, 202.

² *Blood v. Harrington*, 8 Pick. 552, 555; holding the *prochein ami* liable, is overruled in *Crandall v. Slaid*, 11 Metc. 288, 290, on the authority of *Smith v. Floyd*, 1 Pick. 275; *Howett v. Alexander*, 1 Dev. 431; *Leavitt v. Bangor*, 41 Me. 458; *Sanborn v. Merrill*, 41 Me. 467.

³ "The rule has extensively prevailed that the next friend of an infant plaintiff is responsible for the costs of suit, while in the case of the guardian *ad litem* of an infant defendant the responsibility for costs is upon the infant, not upon the guardian. Possibly this distinction may have regard to the fact that an infant plaintiff comes into court on his own

motion, while an infant defendant is forced into court:" *Berry, J.*, in *Bryant v. Livermore*, 20 Minn. 313, 343; *Strayer v. Long*, 83 Va. 715, 719.

⁴ The statute provided that "the court may appoint a guardian *ad litem* for any infant or insane defendant to any suit in equity, and compel such guardian to act, but provided that he shall not be liable for costs, and that "he shall, moreover, be allowed a reasonable sum for his charges as such guardian, to be paid by the party at whose motion he was appointed, to be taxed in the bill of costs." It was held that on the failure of the record to show on whose motion the appointment was made, it is presumed to have been made under the prayer of the plaintiff (petitioner in partition), and he was held liable for the taxable costs, and for the fees of the attorney employed by the guardian *ad litem*: *Smith v. Smith*, 69 Ill. 308, 310.

⁵ The statute mentioned in the case of *Smith v. Smith*, 69 Ill. 308, was changed by omitting therefrom the words "to be paid by the party at whose motion he was appointed;" and in consequence of such elimination the court held that the complainant in chancery who procures the appointment of a guardian *ad litem* is no longer liable to pay, as costs, the guardian's fees and other expenses: *Hutchinson v. Hutchinson*, 152 Ill. 347, 353, affirming s. c. 50 Ill. App. 87, 91.

⁶ *Sanderson v. Sanderson*, 17 Fla. 820, 829; holding that the statutory requirement of a bond from one suing as next friend applied to chancery proceedings, was overruled in *Pace v. Pace*, 19 Fla. 438, 448, holding that the statute related exclusively to proceedings at common law: *Kingsbury v. Buckner*, 134 U. S. 650, 679. In New York the statute authorizes the appointment of the register or clerk of

he is not entitled to receive the fruit of a judgment,¹ but the money recovered is to be paid over to a lawful guardian alone,² or into court.³

The authority of the *prochein ami*, as well as that of the guardian *ad litem*, is limited to the representation of the ward's interests and rights in the proceedings which rendered the appointment necessary,⁴ and terminates with the final judgment or decree resulting therefrom.⁵ The death of a next friend does not abate the suit of the minor; but the minor may subsequently, on becoming of age, prosecute the suit to final determination.⁶ So the authority of a guardian *ad litem* continues until removed by the court that appointed him; the appointment of a general guardian by the court having jurisdiction in lunacy does not suspend the functions of the guardian *ad litem*.⁷

It is the duty of the guardian *ad litem* to file an answer for the infant, and of the court to compel him thereto, or to appoint another guardian *ad litem*, and it is error to dismiss or render judgment by default for the want of an answer.⁸ It is not sufficient that the guardian file a general denial, and submit the minor's interest to the protection of the court; the answer should be a full defence specifically denying the material allegations of the complaint;⁹ and it is the duty of the court *sua sponte* to see that proper defence is made.¹⁰ The rule is well established that neither a next friend nor a guardian *ad litem* can, by admissions or stipulations, surrender the rights of the infant;¹¹ there must be proof of every material

Termination of authority.

Duty of guardian *ad litem* to answer.

Cannot bind ward by admission.

the court as guardian *ad litem* for an absent non-resident infant without bond: *Minor v. Betts*, 7 Pai. 596; and in Indiana it is held that where an infant plaintiff cannot procure any person to act as next friend, such person may be allowed to sue as a poor person, and without a next friend: *Wright v. McLarinan*, 92 Ind. 103, 104.

¹ *Albert v. State*, 66 Md. 325, 332; *Smith v. Redus*, 9 Ala. 99; *Galveston Oil Co. v. Thompson*, 76 Tex. 235, 239.

² *Isaacs v. Boyd*, 5 Port. 388.

³ *Smith v. Redus*, *supra*; *Clements v. Ramsey*, 4 S. W. (Ky.) 311.

⁴ A guardian *ad litem* has but one duty, and that is to defend the action: Per Bliss, J., in *McClure v. Farthing*, 51 Mo. 109.

⁵ *Davis v. Gist*, Dud. Eq. 1, 14.

⁶ *Tucker v. Wilson*, 68 Miss. 693, 697.

⁷ *Hicks v. Hicks*, 79 Wis. 465, 470.

⁸ *Henly v. Gore*, 4 Dana, 133, 136; *Ullery v. Blackwell*, 3 Dana, 300; *Richards v. Richards*, 17 Ind. 636; *Brennor v. Bigelow*, 8 Kans. 496, 500.

⁹ *Pillow v. Sentelle*, 39 Ark. 61, 64; *Varner v. Rice*, 44 Ark. 236, 244. He should examine into the case, and ascertain the rights of the ward, and interpose such defence as their interest demands, using such care and judgment as a reasonably prudent man would bring to bear: *Stunz v. Stunz*, 131 Ill. 210, 221.

¹⁰ *Peak v. Pricer*, 21 Ill. 164; *Lloyd v. Kirkwood*, 112 Ill. 329, 338.

¹¹ Per Harlan, J., in *Kingsbury v.*

allegation prejudicial to the infant's rights before there can be judgment against them.¹ The settlement of an action brought by an infant by next friend, made out of court and not approved, does not conclude the infant, and is not admissible in evidence for the defendant at the trial.² But a guardian *ad litem* may be clothed by statute with the full powers that his ward would have if of age; and in such case the guardian *ad litem* has authority to bind his ward by a stipulation waiving proof. The rule, that a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant, does not prevent the assent to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved;⁴ nor is judgment against a minor by consent of his guardian *ad litem* wholly void;⁵ and if it be to the infant's advantage, it will stand, subject to be opened when he comes of age.⁶ But beyond the rights reserved to infants by the statute,⁷ they have no further claims to impeach the proceedings against them than is accorded to adults; they are concluded by the decree or judgment rendered against them, although a defence existed which the guardian *ad litem* failed to assert.⁸

In California, it is held that the statute providing for the appointment of a guardian *ad litem* to represent infants does not apply in California. to probate proceedings; but that, under the Code, an attorney is to be appointed to represent infants in probate proceedings. These attorneys, though not so named, perform the functions of a guardian *ad litem*.⁹

The necessity to protect the rights of infant defendants involves that the guardian *ad litem* appointed to that end should be compensated; and the proper court to fix their compensation is the

Buckner, 134 U. S. 650, 680; Bennett v. Bradford, 132 Ill. 269, 272; Walker v. Grayson, 86 Va. 337, 344; Crotty v. Eagle, 35 W. Va. 143, 150; Bearinger v. Pelton, 78 Mich. 109; Tucker v. Bean, 65 Me. 352; Cartwright v. Wise, 14 Ill. 417; Peck v. Adsit, 98 Mich. 639, 643.

¹ State v. Atkins, 53 Ark. 303, 307; Stinson v. Pickering, 70 Me. 273, 275; Revelly v. Skinner, 33 Mo. 98; Ashford v. Patton, 70 Ala. 479, 482.

² Tripp v. Gifford, 155 Mass. 108.

³ Le Bourgeoise v. McNamara, 82 Mo. 189, 192, affirming s. c. in 10 Mo. App. 116, 119.

⁴ Kingsbury v. Buckner, 134 U. S. 650, 680.

⁵ But may be reversed for error on appeal: San Fernando v. Porter, 58 Cal. 81.

⁶ Pulliam v. Pulliam, 4 Dana, 123, 125; Walsh v. Walsh, 116 Mass. 377, 382.

⁷ For instance, to have proceedings to review the decree within one year after attaining majority; their exemption from the statute of limitation barring writs of error and appeals.

⁸ Cocks v. Simmons, 57 Miss. 183, 197.

⁹ Carpenter v. Superior Court, 75 Cal. 596, 600.

one which is the witness of their services.¹ The guardian is allowed a lien for his services on the property protected,² if the fund is in court for distribution.³

Compensation
to guardians
ad litem.

§ 23. *Guardians in Socage*.—It appears from the statement of the nature of guardianship in socage at the common law,⁴ that this species of guardianship cannot exist in America, because the guardian must be some relation by blood who cannot possibly inherit.⁵ But traces of it are

No guardian-
ship strictly in
socage in
America.

found in New Jersey and New York, in which States it is recognized, at least in name, although shorn of its essential features at common law. In New York, the powers, duties, and liabilities of guardians in socage are prescribed by statute⁶ and are, so far at least as real estate is concerned, the same as those of general guardians, limited, however, to the real estate, and the personalty connected therewith, such as animals, implements, &c. He may not reduce to possession, release, discharge, or otherwise dispose of the choses in action of his ward.⁷ Guardianship, with the rights, powers, and duties of guardians in socage, to infants in whom lands are vested belongs (1) to the father; if no father, then (2) to the mother; if neither, then (3) to the nearest and eldest relative of full age not under legal incapacity.⁸ In New Jersey, the statute mentions the duties of guardians in socage, among those of other guardians, to file inventory, &c.,⁹ and it is held that there can be no guardianship in socage where there is no liability to pay the rent or render the services incident to the tenancy in socage.¹⁰ In *Snook v. Sutton*,¹¹ holding that a lease made by the guardian of an infant under fourteen for a period extending beyond that age voidable, this principle is deduced from the common law governing the authority of guardians in socage. So it is held

Similar office
in New York.

In New Jersey.

¹ Per Rombauer, P. J., rendering the opinion of the Court of Appeals in *Walton v. Yore*, 58 Mo. App. 562, 565; *Matter of Mathews*, 27 Hun, 254; *Gott v. Cook*, 7 Paige, 521, 544; *McCue v. O'Hara*, 5 Redf. 336; *Robinson v. Fidelity Co.*, 11 S. W. (Ky.) 806; *Cole v. Superior Court*, 63 Cal. 86, 90; *Nagel v. Schilling*, 14 Mo. App. 576; *Walker v. Hallett*, 1 Ala. 379, 390; *Sheahan v. Judge*, 42 Mich. 69.

² *Kerbaugh v. Vance*, 5 Lea, 113; *Wilbur v. Wilbur*, 138 Ill. 446, 452; *Holloway v. McIlhenny*, 77 Tex. 662.

³ *Matter of Mathews*, *supra*.

⁴ *Ante*, § 14.

⁵ 2 Kent, *223, 224; *Reeve*, Dom. Rel. 388; *Schoul.* Dom. Rel. § 290.

⁶ 4 Banks & Br. (8th ed. 1889), p. 2613.

⁷ *Foley v. Mutual L. L. Co.*, 138 N. Y. 333, 339.

⁸ 4 Banks & Br. p. 2418. See *Foley v. Mutual L. L. Co.*, 138 N. Y. 333, 338.

⁹ *Graham v. Houghtalin*, 30 N. J. L. 552, 564.

¹⁰ *Graham v. Houghtalin*, *supra*, 30 N. J. L. 552, 565.

¹¹ 10 N. J. L. 133.

that the guardian appointed by the Orphan's Court takes the place of the guardian for nurture and of a guardian in socage in the ancient law.¹

In New York, it was held that the revision of the statutes modified the rules of the common law as to guardianship in socage, so that a father was vested with the right whenever his child took an estate in lands.² The guardianship in socage lasts, strictly, only until the infant arrives at the age of fourteen; but if no other guardian is appointed, it continues.³ The guardian has the custody of the land, and is entitled to the profits for the benefit of the heirs, may lease the land, and have trespass.⁴

It is apparent from these decisions, and the statutes which they construe, that even in New York and New Jersey there is but slight occasion to distinguish between a general guardian and a guardian in socage. By the very terms of the New York statute the powers, duties, and liabilities of general guardians and of guardians in socage are identical;⁵ nor is any distinction pointed out in New Jersey. In other States this species of guardianship is unknown.

§ 24. **Guardians in General.** — Having, in the preceding pages, discussed the origin and nature of the power exercised by the various courts for the protection of infants, tracing the historical development of the jurisdiction over guardians in England, and showing to what extent the principles involved have impressed themselves upon the courts and legislatures of this country, it remains, before passing to the more practical elements of this treatise, to mention a class of guardians unknown to the English law, but which has substantially sup-

No difference
between
general guar-
dian and in
socage.

General
guardians in
America.

¹ Van Doren v. Everitt, 5 N. J. L. 460, 462.

² Fonda v. Van Horne, 15 Wend. 631, 633.

³ Jackson v. Combs, 7 Cow. 36; Byrne v. Van Hoesen, 5 Johns. 66; Snook v. Sutton, 10 N. J. L. 133.

⁴ Byrne v. Van Hoesen, *supra*; Jackson v. De Walts, 7 Johns. 157; Hynes, *in re*, 105 N. Y. 560; Torry v. Black, 58 N. Y. 185, 189, citing earlier New York cases; Emerson v. Spicer, 46 N. Y. 594, 597.

⁵ The common law rule of guardianship in socage never prevailed in chancery: Morehouse v. Cook, Hopk. Ch. 226. It is stated in Torry v. Black, 58 N. Y. 185,

189, that a guardian appointed by the surrogate on the application of a minor above the age of fourteen has the same powers to bring actions in relation to the real and personal estate of the ward as a guardian in socage might by law; and that "a guardian in socage could maintain actions for injuries to the real and personal estate of the ward;" but in later cases it is intimated (Segelken v. Meyer, 94 N. Y. 473, 479) and held (Foley v. Mutual L. I. Co., 18 N. Y. Supp. 615) that, in New York, guardians in socage have neither common law nor statutory right to control the personal estate of their wards.

planted all other classes in the United States. Chancery guardians, like guardians *ad litem*, become necessary, sometimes, in legal proceedings affecting infants having no general guardian; the natural guardianship of father and mother is fully recognized, but, as it extends only to the guardianship of the person, it gives comparatively small occasion for the interference of courts, and then only requiring them to mark the boundary between parental rights and those of others; while testamentary guardians differ from ordinary guardians chiefly in the source of their appointment, somewhat like the executor differs from the administrator. But guardians (without a qualifying adjective) to take care of the persons of infants having no natural guardian, or to administer their estates when not derived from the acting parent, are usually appointed by courts having probate jurisdiction, and are for that reason known, sometimes, as *probate guardians*. This term is significant enough, in most States, to distinguish them from chancery, natural, or testamentary guardians, or guardians *ad litem*, whenever it becomes necessary to draw such distinction. Usually the term guardian, when not connected with a descriptive word, denotes one appointed by a court having probate jurisdiction; and when it is applied to one of another class, it is under circumstances which make it indifferent to which class he belongs. Guardians have usually the custody of the person as well as the management of the estate of their wards;¹ but the court may appoint one person guardian of the person, and another guardian of the estate,² in which case the term *curator* is sometimes employed to designate the person having in charge the estate, in contradistinction to the one having custody of the person, or of the person *and* estate, who is known as guardian.³ An Iowa case intimates that a statute providing for the appointment of a guardian, not distinguishing between the guardianship of the person and of the estate, does not contemplate in any case the appointment of two guardians to the same ward, and points out how such appointment might operate to the

Known as
Probate
Guardians.

Custody of
persons and of
property.

Curator.

¹ Schoul. Dom. Rel. § 320; Ten Brook v. McColm, 12 N. J. L. 97; Van Doren v. Everitt, 5 N. J. L. 460, 462.

² So in Arkansas: Dig. St. 1894, § 3581; Illinois: St. & Curt. Ann. St. Ch. 64, § 10; Minnesota: Gen. St. 1891, § 5749; Mis-

souri: Rev. St. 1889, § 5288; New York: Code Civ. P. (1882) Banks & Bro. § 2821; Texas Rev. Civ. St. 1891, § 2589.

³ Summers v. Howard, 38 Ark. 490; Duncan v. Crook, 49 Mo. 116.

injury of the ward;¹ but in a later case the court hold that where the interest of the ward will be best subserved thereby, the Probate Court has the undoubted power to appoint one as guardian of the person, and another the guardian of the estate.² A division of the authority over the person and over the estate of infants necessarily follows, also, in all those cases in which parents, refusing or being unable to give bond as required by statute for the management of the property of their children, still remain guardians of the person, though some one else be appointed guardian or curator of the estate of the infants.

The term *General Guardian* is applied, mostly, to guardians appointed by probate or other testamentary courts to distinguish them from chancery guardians, or from guardians *ad litem*; and in some instances from special guardians who have not full control of the person and estate of their wards. But in Alabama the statute provides that the probate judge may appoint a general guardian to hold office during his own term of office, and to whom is committed the guardianship of any infant for whom no other person will apply or qualify as guardian.³ If there be no general guardian, and no fit person will apply or qualify, the sheriff must be appointed, and in such case the guardianship attaches to his office.⁴ Similar provisions exist in other States for a *public guardian*, whose duty it is to take charge of the persons and estates of minors for whom no other guardian can be found. They give bond and qualify as other guardians, and are liable like them.⁵

The term *quasi guardian*, or guardian *de son tort*, has been applied to persons who, without legal appointment or qualification, assume the functions of a guardian by exercising control over the person, or estate, or both, of a minor.⁶ He is subject to all the responsibilities that attach to a legally constituted guardian or trustee. If he takes advantage of the confidence reposed, or of the means afforded him by such relation, by buying up outstanding debts of the estate, for in-

¹ *Burger v. Frakes*, 67 Iowa, 460, 462.

² *Lawrence v. Thomas*, 84 Iowa, 362.

³ Code Civ. 1887, § 2376.

⁴ Code Civ. Ala. 1887, § 2377.

⁵ So in Missouri: Rev. St. 1889, § 5336;

North Carolina: Code, 1883, § 1556 *et seq.*;

Tennessee: Code, 1884, § 545.

⁶ *Hanna v. Spotts*, 5 B. Mon. 362, 365.

And see authorities cited, *post*, § 94, on the question of chancery jurisdiction over guardians' settlements.

stance, at an under rate, and using them, with or without the sanction of a judicial proceeding, to acquire in his own name the valuable lands of the infant wards, he is guilty of fraud and breach of trust entitling the infants to the interposition of a court of equity.¹ He who arrogates to himself functions of a guardian will be held to stricter account in chancery than a regularly appointed guardian.² So the agent or husband of an administratrix and guardian, who assumes control and management of the estate and uses the trust funds for his private purposes, makes himself liable to the infants as a trustee *de son tort*.³

¹ *Hanna v. Spotts*, *supra*.

² *Davis v. Harkness*, 6 Ill. 173.

³ *Lehmann v. Rothbarth*, 111 Ill. 185, 195.

CHAPTER IV.

OF THE APPOINTMENT OF GUARDIANS TO MINORS.

§ 25. **Courts having Power to appoint Guardians.**—All courts having power to grant letters testamentary or of administration, in any of the States, have, it is believed, without exception, the power also of appointing guardians when the interests of an infant within their territorial jurisdiction render such appointment necessary. This power is granted by statute to probate courts in Alabama,¹ Arkansas,² Colorado,³ Connecticut,⁴ Dakota (North and South),⁵ Florida,⁶ Idaho,⁷ Illinois,⁸ Indiana,⁹ Kansas,¹⁰ Maine,¹¹ Massachusetts,¹² Michigan,¹³ Minnesota,¹⁴ Missouri,¹⁵ Montana,¹⁶ Nebraska,¹⁷ Nevada,¹⁸ New Hampshire,¹⁹ Ohio,²⁰ Rhode Island,²¹ South Carolina,²² Vermont,²³ and Wyoming;²⁴ to the Superior Court by statute of California;²⁵ to the Ordinary in Georgia;²⁶ to the circuit or district courts in Iowa;²⁷ to county courts in Kentucky,²⁸ Oregon,²⁹ Tennessee,³⁰ Texas,³¹ West Virginia,³² and Wisconsin;³³ to the Orphan's Court in Maryland³⁴ and Pennsylvania;³⁵ to the Orphan's Court or

¹ Code Civ. 1887, § 2370.

² Dig. St. 1884, § 3461.

³ Mills' Ann. St. 1891, § 2074.

⁴ Gen. St. 1887, § 455.

⁵ Comp. L. Terr. 1887; re-enacted for South Dakota Sess. L. 1890, ch. 105. In North Dakota by Rev. Code, 1895, § 6537, the County Court appoints.

⁶ Judges of County Court acting as judges of probate: Dig. 1881, ch. 111, § 1.

⁷ Rev. St. 1887, § 5770.

⁸ County or Probate Court: St. & Curt. Ann. St. ch. 64, ¶ 2.

⁹ Court of probate jurisdiction: St. 1888, § 2512.

¹⁰ Gen. St. 1889, § 3220.

¹¹ Rev. St. 1883, ch. 67, § 1.

¹² Pub. St. 1882, ch. 139, § 1.

¹³ Gen. St. 1882, § 6302.

¹⁴ Gen. St. 1891, § 5743.

¹⁵ Rev. St. 1889, § 5280.

¹⁶ Civ. Code, 1895, § 347.

¹⁷ Comp. St. 1891, ch. 34, § 2.

¹⁸ Gen. St. 1885, § 548.

¹⁹ Gen. L. 1878, ch. 185, § 1.

²⁰ Rev. St. 1890, § 6254.

²¹ Pub. St. 1882, ch. 168, § 2.

²² Code Civ. Pr. 1893, § 50.

²³ St. 1894, § 2734.

²⁴ Rev. St. 1887, § 2251.

²⁵ Civ. Code, 1885, § 243.

²⁶ Code, 1892, § 1806.

²⁷ Code & St. 1888, § 3433.

²⁸ St. 1894, § 2015.

²⁹ Code, 1887, § 2880.

³⁰ Code, 1884, § 3363.

³¹ Civ. St. 1888, § 2469.

³² Code, 1887, ch. 82, § 3.

³³ Rev. St. 1878, § 3962.

³⁴ Rev. Code 1878, Art. lii. pl. 1, 2.

³⁵ Bright. Purd. Dig. p. 278, § 3.

Surrogate in New Jersey;¹ to the Surrogate in New York;² to the Chancery Court exercising probate jurisdiction in Mississippi;³ to the clerk of the Supreme Court in North Carolina,⁴ and to the circuit, county, or corporation courts in Virginia,⁵—all of these courts being vested also with power to grant letters testamentary and of administration. This jurisdiction is, of course, collateral to and independent of whatever jurisdiction to appoint guardians to infants may be vested in chancery courts. It would be inaccurate, perhaps, to predicate *concurrent* jurisdiction of both classes of courts, because probate courts appoint general guardians, whose duty it is to represent the ward in all legal proceedings and take care of his person and property, while chancery courts appoint only when the infant has become a ward in chancery, *i. e.*, when a bill has been filed by or against the infant. Thus a chancery court will never appoint a chancery guardian to an infant for whom the Probate Court has already appointed a general guardian, except when it becomes necessary to proceed against such general guardian; and in such case it is usual first to revoke his authority; while it may become necessary, under the statutes of most of the States, to appoint a general guardian for one who has a guardian in chancery.⁶ Testamentary guardians, although deriving their original appointment from the deed or will of the father or mother, must in most States be recognized by and qualify before the court having probate jurisdiction before they can act for their wards, as indicated in discussing the subject of testamentary guardians,⁷ and as will again appear in connection with the subject of their bonds, etc.⁸ But a guardian lawfully appointed in a divorce proceeding by a court having jurisdiction to grant divorces, cannot be removed by a county court having testamentary jurisdiction; the jurisdiction of the Probate Court to appoint a guardian does not attach in such case.⁹

Surrogates.
Chancery
courts.

Clerk of
Supreme
Court.

Corporation
courts.

Distinction of
jurisdiction
between chan-
cery and pro-
bate courts.

¹ Rev. 1877, p. 759, § 35.

² Bank & Br. Code Civ. Pr. § 2821.

³ Ann. Code, 1892, § 2186. The word "orphan," in the statute giving jurisdiction to probate courts to appoint guardians, is construed to mean a fatherless child: *Stewart v. Morrisson*, 38 Miss. 417.

⁴ Code, 1883, § 1566.

⁵ Code, 1887, § 2599.

⁶ See, on the power to appoint chancery guardians, *ante*, § 18.

⁷ *Ante*, § 20.

⁸ *Post*, § 39.

⁹ *Jordan v. Jordan*, 4 Tex. Civ. B. 559.

§ 26. Local Jurisdiction of Courts to Appoint Guardians.—
Most of the statutes condition the exercise of the power to

Appointment
in county of
residence.

appoint guardians upon the residence of the infant within the county or district over which the territorial jurisdiction of the court extends. Of course, an appointment in disregard of such condition is void, and may be treated as a nullity in a collateral proceeding;¹ and this is so whether the statute expressly negatives the power to appoint for a non-resident infant of such county or not, unless a warrant can be found in the statute itself which confers the jurisdiction.² It

Invalidity of
appointment
cannot be
pleaded by
guardian.

should not be understood, however, that the invalidity of the appointment by a court not possessing the local jurisdiction can be pleaded by the person so appointed, or by his surety, against the demand of a legally appointed guardian for money received in good faith as property of the ward; he, as well as his surety, is clearly estopped from denying his liability.³

The residence of infants conferring the jurisdiction in the sense of these statutes means domicil, or home, as distinguished from

Domicil of
infants that of
their parents.

residence, which may be temporary, or for a special purpose.⁴ The domicil of an infant is that of his father, if legitimate, or of his mother, if illegitimate, or after the father's death,⁵ or of a grandparent or other person standing *in loco parentis*.⁶ The placing of a child by its father in the custody of a person residing in another county does not affect the child's domicil, nor the mother's right to its custody and care after the father's death; so that after her death the jurisdiction to appoint a guardian is in the county in which she was domiciled at the time, although she had been adjudged insane before the father's death, and never declared restored.⁷

Until he ac-
quire a new
one.

This domicil remains until the infant legally acquires another; and since the law conclusively disables in-

¹ De Jarnett v. Harper, 45 Mo. App. 415, 419; Lacy v. Williams, 27 Mo. 280, 282; Maxsom v. Sawyer, 12 Ohio, 195, 207; Dorman v. Ogbourne, 16 Ala. 759; Succession of Shaw, 13 La. An. 265 (referring to the national domicil).

² Woerner on Adm. § 142.

³ McClure v. Commonwealth, 80 Pa. St. 167, 169. See, on this point, *post*, § 38.

⁴ School Directors v. James, 2 W. & S. 568, 572; Jenkins v. Clark, 71 Iowa, 552,

555; Shorter v. Williams, 74 Ga. 539; Wells v. Andrews, 60 Miss. 373; Ware v. Coleman, 6 J. J. Marsh. 198.

⁵ Jacobs' Law of Domicil, § 105; Westlake Priv. Int. Law, p. 35; Wharton's Commentaries, § 256; Ludlam v. Ludlam, 26 N. Y. 356, 371.

⁶ Darden v. Wyatt, 15 Ga. 414.

⁷ De Jarnett v. Harper, 45 Mo. App. 415, 420.

infants from acting for themselves during minority, their domicile cannot be altered by their own acts before reaching majority.¹ Hence the legal domicile of infant orphans is at the place where the father was domiciled at the time of his death,² unless they have acquired a new domicile by remaining a member of the family of the mother when the mother acquires a domicile different from that of the children's father, or gain a new domicile in some way recognized as sufficient by the law. It is the Probate Court of the county in which this domicile is situated that has alone the power to appoint the guardian.³

The authorities are substantially unanimous in according to the mother, while remaining a widow, the power to alter the domicile of her infant children by changing her own.⁴ Doubts which have been expressed as to her power to retain for her children their domicile, while changing her own,⁵ and as to the effect of the change of the widowed mother's domicile upon her infant children when she is not their guardian,⁶ seem of little importance in cases where the infant accompanies the mother and resides with her in the new place of abode.⁷ But since the mother, on her re-marriage, ceases to be the head of the family of her deceased husband, and necessarily takes the domicile of her second husband, so that she has no domicile of her own which she could impart to her children, these retain the domicile which they had during the mother's widowhood.⁸

Mother may alter her children's domicile.

But not after her re-marriage.

¹ Schoul. Dom. Rel. § 230; Taylor v. Jeter, 33 Ga. 195, 201; Bartlett, *ex parte*, 4 Bradf. 221; Warren v. Hofer, 13 Ind. 167; Succession of Vennard, 44 La. An. 1076, 1079.

² Daniel v. Hill, 52 Ala. 430, 435; Wells v. Andrews, 60 Miss. 373; Allgood v. Williams, 8 South. 722; Bedgood v. McLain, 94 Ga. 283, 286.

³ Duke v. State, 57 Miss. 229; Munson v. Newson, 9 Tex. 109; Lewis v. Castello, 17 Mo. App. 593, 596; Jenkins v. Clark, 71 Iowa, 552, 555; Herring v. Goodson, 43 Miss. 392. An early New Hampshire case holds the contrary, on the ground that the statute authorized the judge of probate to appoint a guardian to a minor "when and so often as there shall be occasion:" Judge v. Hinds, 4 N. H. 464.

⁴ Jacobs, Dom. §238, and list of author-

ities; Lamar v. Micou, 112 U. S. 452, 470; Carlisle v. Tuttle, 30 Ala. 613, 623; Succession of Lewis, 10 La. An. 789.

⁵ Brown v. Lynch, 2 Bradf. 214, 216.

⁶ Dicey on the Law of Domicil, 98 *et seq.*

⁷ Jacobs, in his exhaustive treatise on the Law of Domicil, reaches the conclusion that the question is an open one, but submits that the power of giving to an infant an entirely new domicile, independent of his own, has never been affirmed with respect to the father, and *a fortiori* can scarcely be held with respect to the mother: Jac. Dom. § 241.

⁸ Lamar v. Micou, 112 U. S. 452, 470; Freetown v. Taunton, 16 Mass. 52; Johnson v. Copeland, 35 Ala. 521; Mears v. Sinclair, 1 W. Va. 185, 195.

It frequently happens, however, that infants are brought from the State or country of their domicil into another, so that they have their domicil in one, while they reside in another State or country, where it may be necessary for their protection to give them a legal guardian. In such cases the mere temporary residence of the infant within the sovereignty is sufficient to confer jurisdiction on the courts of that State or country to appoint a guardian, although he have no property and a technical domicil elsewhere,¹ and, *a fortiori*, where the wards are members of an Indian tribe resident in the State of the former, though such tribe is recognized as a distinct nation of people.² Such appointment is good for acts done within the jurisdiction, as to property actually there;³ though not as to property in the State of the domicil.⁴ But it will not avail to give jurisdiction if, with this purpose in view, the infant be brought into the State by strategy; courts cannot sanction such methods of invoking their jurisdiction;⁵ the appointment of a guardian to an infant neither domiciled nor residing in the State, nor having property there, is simply void.⁶

§ 27. *Domicil as affected by Acts of the Guardian.* — On the question, whether a guardian can alter the domicil of his ward, the authorities are not unanimous. Jacobs says that the opinions of American text-writers are about equally divided, both in point of number and of authority.⁷ He presents a diligent collection of cases *pro*⁸ and *con*, and

¹ So decided after deliberate arguments by the English House of Lords: *Johnstone v. Beattie*, 10 Cl. & Fin. 42, 85, 145; *Hubbard, in re*, 82 N. Y. 90, 92; *Farrington v. Wilson*, 29 Wis. 383, 400. And see *Rice's Case*, 42 Mich. 528, holding that where a person having left his domicil with the intention not to return, dies before acquiring a new domicil, the legal character of the old domicil does not necessarily control in matters of policy or in determining the place where a guardian for the deceased's infant should be appointed. To similar effect: *Taney's Appeal*, 97 Pa. St. 74, 77; *Wilkins' Guardian*, 146 Pa. St. 585, 590.

² *Farrington v. Wilson*, 29 Wis. 383, 400.

³ *Ross v. S. W. Railroad*, 53 Ga. 514, 530.

⁴ *Munday v. Baldwin*, 79 Ky. 121.

⁵ *Hubbard, in re*, 82 N. Y. 90, 95.

⁶ *Hubbard, in re, supra*; *Boyd v. Glass*, 34 Ga. 253, 256; *Grier v. McLendon*, 7 Ga. 362, 364; see also, on this point, *post*, § 28 (p. 88, n. 4).

⁷ He classes Kent in the affirmative, Story in the negative, and Wharton as holding the negative so far as the succession is affected, but asserting that "the technical *forum* of the minor is always, and unquestionably, that of the parent or guardian:" *Jac. Dom.* § 253.

⁸ Among the American cases holding that the guardian has such power, is that of *Townsend v. Kendall*, 4 Minn. 412, 418, which cites as authority for the proposition the following cases: *Guier v. O'Daniel*, 1 Bin. 349, note (a), not turning on the ques-

deduces from the American decisions the doctrine: (1) That a guardian has the power to change the municipal domicil of his ward. (2) That the domicil of the ward is not necessarily that of his guardian. (3) That the natural guardian certainly, and the testamentary guardian probably, has the power to change the national or *quasi*-national domicil of his ward unless expressly prohibited by a competent court. (4) That the power of an appointed guardian to change the national or *quasi*-national domicil of his ward is, to say the least, very doubtful.¹ The extreme caution with which these views are announced detract somewhat from their value as a positive statement of the law, and something may, perhaps, be gained in this direction by a brief analysis of the propositions, the first two of which deal with the question in its municipal aspect, *i. e.* of the change of domicil from one geographical division of the sovereignty to another, while the last two concern the change of domicil from one State or country to another.

Authorities divided. Opinion of Jacobs.

In this latter aspect, a sharp distinction is drawn between the several kinds of guardians, ascribing, without hesitation, the power to change the national, or *quasi*-national domicil of a ward to the natural guardian; inclining to grant a similar power to the testamentary guardian; and inclining to deny such power in appointed guardians. Remembering that only parents are recognized as natural guardians,² or grandparents when next of kin,³ the statement that natural guardians may change the domicil of their wards is of very little more force than the statement that the domicil of parents determines that of their infant children; for *non constat* but that it is

Natural guardian may alter ward's domicil.

tion of a guardian's domicil, but of a father's; *Cutts v. Haskins*, 9 Mass. 543, deciding that the appointment of an administrator in a county where the intestate was not domiciled at the time of his death, is void, — a proposition overruled in later Massachusetts cases; *Holyoke v. Haskins*, 9 Pick. 259, deciding that the domicil of a person *non compos mentis* may be changed with the assent of the guardian; *Wood v. Wood*, 5 Pai. 596, 605, in which a testamentary guardian who was directed by the will to remove the wards to another State, was enjoined from doing so by a chancery court, and *Pedan v. Robb*, 8 Ohio, 227,

which was a bill in chancery praying for an account against the administrator of a deceased guardian, the father of his ward, who had emigrated from another State, in which he had been appointed guardian, together with his son. Not one of the cases thus cited holds that a guardian who is not the father of the ward has the power to alter the domicil of an infant under guardianship.

¹ *Jac. Dom.* § 260.

² *Ante*, § 14, p. 40; § 19, p. 58.

³ *Lamar v. Micou*, 114 U. S. 218, 222, citing authorities: *Darden v. Wyatt*, 15 Ga. 414.

the parent, and not the guardian, who effects the change.¹ So, also, the power claimed for testamentary guardians to work a change in the domicil of their wards may be, and in some of the cases expressly is, ascribed, not to their functions as guardians under the law, but to the act of the testator exercising *his* authority to change the domicil of his infant child.² It would seem, therefore, that the strong doubt expressed by Jacobs, as to the power of appointed guardians to change the national domicil of their wards, is based upon a principle applying with equal force to the other two classes of guardians when considered in their capacity as guardians alone, unaffected by their authority as parents, or as the head of a family into which the ward has been adopted. This principle is shown in strong light in a case arising under the Code of Louisiana.³ It is emphasized in this case that the authority of a natural tutor follows him to any other country or State, while that of other tutors, being the creature of positive legislation, ceases *ipso facto* by their removal from the State.⁴ In a late Pennsylvania case, the court intimate that the domicil of a minor, who has a guardian of his person appointed by the court of his domicil, cannot be changed by such guardian, without the consent of that court.⁵

¹ This is emphasized in, or deducible from, some of the American cases cited by Jacobs: *School Directors v. James*, 2 W. & S. 568; *Mears v. Sinclair*, 1 W. Va. 185; *Lamar v. Micon*, 112 U. S. 452, 471; *Wheeler v. Hollis*, 19 Tex. 522, 526. See also *Daniel v. Hill*, 52 Ala. 430, 435; *Succession of Lewis*, 10 La. An. 789; *Bartlett, ex parte*, 4 Bradf. 221; *Succession of Cass*, 42 La. An. 381, 384; *Kraft v. Wickey*, 4 Gill & J. 332, 334; *Matter of Benton*, 60 N. W. (Iowa) 614.

² Per Porter, J., in *Robins v. Weeks*, 5 Mart. (N. S.) 379 *et seq.*; *White v. Howard*, 52 Barb. 294, 318. In the case of *Wood v. Wood*, 5 Pai. 596, a testamentary guardian was enjoined, on the petition of his ward's mother, from removing the infant to another State, as directed by the father's will, on the ground that a chancery court possessed the same power to prevent a testamentary guardian from carrying his ward out of the State under circumstances making such removal unreasonable, as it did to prevent a father

from removing his child under the same circumstances: p. 604.

³ *Robins v. Weeks, supra*. The Code of Louisiana provides for the convocation of a family meeting by a widow who wishes to marry again and retain her authority as natural tutrix, in default of which she forfeits such right. A widow, having neglected this ceremony, married, and was subsequently joined with her second husband as co-tutrix of the child from the first marriage, and all three emigrated to another State. It was held, that by the widow's marriage without taking the advice of a family meeting, and her subsequent appointment as tutrix, she held the office, not as natural tutrix, but by virtue of the appointment; and that in consequence of her holding the office by appointment under the law, and not as natural tutrix, she could not change the domicil of her ward by removal into another State.

⁴ Per Porter, J., 5 Mart. (N. S.) 379, 381.

⁵ *Wilkins' Guardian*, 146 Pa. St. 585, 591.

The same result seems to follow with respect to the power of guardians to change the domicil of their wards, within the State or country, from one of its geographical divisions to another. But while the subject in this aspect is of far less im-
 portance, because a change of domicil from one ^{Change of local domicil.} locality to another in the same State or country works no change in the law applicable to either the person or the property of the infant,¹ it is, on the other hand, mostly covered by the statutes of the several States. It is held in some of them that within the sovereignty in which the guardian has been appointed, the domicil of the ward follows his, so as to determine the forum in which proceedings with reference to the guardianship must be had,² including the appointment of a new guardian after his death,³ and the taxation of his property;⁴ but in the greater number of them the rule is declared to be, that the guardian continues to be under the jurisdiction of the ^{Local jurisdiction remains in court having originally acquired it.} court in which the original jurisdiction to appoint was vested, no matter where the ward may reside,⁵ unless, as provided by statutes of some of the States, the mother remove into another county in the State;⁶ or the ward, on reaching the age of fourteen, should choose another guardian while residing in another county.⁷ And so it is held that an act of the legislature authorizing an ordinary to appoint a guardian to a minor in the county of the guardian's residence, though the ward resided in another county, is constitutional.⁸ It seems to result, from these considerations, and as the tenor of most of the best considered cases on this question, that the authority conferred upon a guardian by virtue of his appointment does not include the power to change the ward's national (or as it is expressed by Jacobs, *quasi-national*) domicil; that they have the power to change the municipal domicil to the extent only in which it is granted by statute; and that, in so far as natural and testamentary guardians possess such power, in respect of the national as

¹ See remarks of Surrogate Bradford in *Bartlett, ex parte*, 4 Bradf. 221, 224.

² *State v. Judge*, 2 Rob. (La.) 160; *Lamar v. Micou*, 112 U. S. 452, 472.

³ *State v. Judge*, 2 Rob. (La.) 418, 422; *Harding v. Weld*, 128 Mass. 587.

⁴ *Kirkland v. Whately*, 4 Allen, 462.

⁵ *Marheinecke v. Grothaus*, 72 Mo. 204; *Garrison v. Lyle*, 38 Mo. App. 558;

Dannecker, in re, 67 Cal. 643; *Dorman v. Ogbourne*, 16 Ala. 759, 764.

⁶ For instance, in Alabama: *Moses v. Faber*, 81 Ala. 445.

⁷ *Marheinecke v. Grothaus, supra*. See, as to the power to choose another guardian, *post*, § 30.

⁸ *Shine v. Brown*, 20 Ga. 375.

well as of the municipal domicil of their wards, it is derived from their status *in loco parentis* (the wards constituting a part of the guardian's family), or as devisees of a testator conferring such power.¹

§ 28. **Appointment of Guardians to Non-resident Infants.** — It is almost invariably held, in the United States, that the authority of Guardianship confers no extra-territorial authority. guardians is limited to the jurisdiction which appointed them, so that it does not extend to other States or countries, unless permitted by the laws thereof.² "The rights and powers of guardians are considered as strictly local," says Story,³ "and not as entitling them to exercise any authority over the person or personal property⁴ of their wards in other States, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators."⁵ From which it follows, that a foreign guardian who desires that his rights as such should be recognized, must obtain ancillary appointment in the State of the forum, if the laws of such State permit the appointment,⁶ unless Recognition of foreign guardians by comity. the law, in the spirit of comity, point out some other method by which the authority of a foreign guardian may be respected in protection of the interests of a non-resident infant. In this view, numerous provisions are made by the statutes of various States authorizing the payment of Authority of foreign guardians conferred by statute. legacies and distributive shares to the representatives of non-resident infants duly authorized under the laws of their domicil;⁷ the appropriation of money to be paid to the domiciliar guardians for the education and support of such non-resident infants, and the sale of their

¹ Johnson v. Copeland, 35 Ala. 521; Daniel v. Hill, 52 Ala. 430, 435; Wynn v. Bryce, 59 Ga. 529, 530.

² Schoul. Dom. Rel. §§ 327, 329; Wharton on Conflict of Laws, § 260.

³ Conf. L. § 499.

⁴ And, *a fortiori*, over the real property: Sto. Conf. L. § 504.

⁵ See on the principles determining domiciliar and ancillary administrations: Woerner on Am. Admin. §§ 157 *et seq.*; Morrell v. Dickey, 1 Johns. Ch. 153, 156; Kraft v. Wickey, 4 Gill & J. 332, 334; Burnet v. Burnet, 12 B. Mon. 323.

⁶ It is usual, in the due exercise of

comity, to give preference to the person already appointed in the minor's country: Hoyt v. Sprague, 103 U. S. 613, 631; West v. Gunther, 3 Dem. 386; Woodworth v. Spring, 4 Allen, 321, 324; note to Andrews v. Herriot, 4 Cow. 508, 529; the guardian so appointed is vested with the custody of the person and the management of the estate: Succession of Gaines, 42 La. An. 699.

⁷ Rev. St. Mo. 1889, § 274; State v. Kaime, 4 Mo. App. 479 (a case by a foreign executor, the statute applying equally to guardians).

real estate, if the personal estate be insufficient;¹ the removal of personal² and the sale and removal of the proceeds of real property³ of non-residents to their guardians in other States.⁴ Foreign guardians are in some States permitted, on filing proof of their domiciliar appointment, and complying with the requirements of the statute in the court having jurisdiction of the property of the non-resident minor, to bring actions, and exercise all the rights and privileges of a domestic guardian.⁵ In some instances this privilege is accorded only to guardians appointed in a State extending the same right to guardians of other States;⁶ and authority may be granted for the appointment of guardians of non-resident minors with authority over special property within the jurisdiction of the court, and in such case the guardian will not possess the authority of a general guardian.⁷ So the power to order payment of a fund, under the control of the court, belonging to a non-resident infant, to his domiciliar guardian, is said to inhere in chancery independent of express statutory authorization.⁸

Authority over special property.

Chancery power to order payment to non-resident guardian.

It follows of necessity from the extra-territorial invalidity of statutory guardianship, that in States in which no provision exists for the authorization of foreign guardians to take charge of property belonging to non-resident minors, ancillary guardians must be appointed in the State in which such property is found.⁹ Such ap-

Ancillary guardianship of estates of non-resident infants.

¹ Rev. St. Mo. 1889, § 5313; *Hart v. Czapski*, 11 Lea, 151, 153; *Bouldin v. Miller*, 87 Tex. 359, 365.

² Rev. St. Mo. § 5316; *In re Wilson*, 95 Mo. 184; *Bernard v. Equitable Co.*, 80 Md. 118; *Lary v. Craig*, 30 Ala. 631; *Carlisle v. Tuttle*, 30 Ala. 613, 631; *Benton, in re*, 60 N. W. (Iowa), 614; *Shook v. State*, 53 Ind. 403, 405; *Matter of Fitch*, 3 Redf. 457.

³ Rev. St. Mo. § 5315; *Estate of Goldsmith*, 13 Phila. 389; *McClelland v. McClelland*, 7 Baxt. 210; *Hickman v. Dudley*, 2 Lea, 375.

⁴ The foreign guardian seeking permission from the court of a State in which he was not appointed to remove his ward's property to his own State, is subject to the laws of the State from which the property is to be removed, and may be compelled

to return the money which he had been improperly allowed to remove: *Clendenning v. Conrad*, 21 S. E. (Va.) 818.

⁵ *Grist v. Forehand*, 36 Miss. 69, 72; *Hines v. State*, 10 Sm. & M. 529, 536; *Sims v. Renwick*, 25 Ga. 58, 60; *Martin v. McDonald*, 14 B. Mon. 544, 548; *Wade v. Fite*, 5 Blackf. 212; *Shook v. State*, *supra*; *Watts v. Wilson*, 93 Ky. 495.

⁶ *Estate of Rice*, 13 Phila. 385.

⁷ *Linton v. National Bank*, 10 Fed. R. 894.

⁸ *Ex parte Smith*, 1 Hill (S. C.) Ch. 140; *Ex parte Heard*, 2 Hill (S. C.) Ch. 54.

⁹ *Hoyt v. Sprague*, 103 U. S. 613, 631; *Neal v. Bartleson*, 65 Tex. 478, 486; *Rice's Case*, 42 Mich. 528, 530; *Leonard v. Putnam*, 51 N. H. 247, 251; *Farrington v. Wilson*, 29 Wis. 383, 400; *Nelson v. Lee*,

pointment may be made without reference to the question whether a general guardian has been appointed in the State of the domicil.¹ In the absence of statutory regulation as to the

Appointment in county where property is found. county in which the appointment is to be made, it may be made in any county of the State in which the property is situated;² usually, however, the power is vested

by statute in the court of the county in which it is found.³ The appointment is, of course, void, if the infant is neither domiciled

Void if no property. nor resident in the State in which it is made, and has no property there.⁴ Where the statute requires notice to be given of application for the appointment of a guardian,

“such notice to all persons interested as the judge shall order,” notice to the minor himself is held unnecessary to the validity of an order appointing a guardian to the estate of a non-resident minor.⁵ But a statute authorizing the grant of letters of administration to the guardian of a minor, instead of the minor himself, refers to a guardian appointed in the State of the forum, and not to one appointed in some other State.⁶

§ 29. Circumstances authorizing the Appointment of Guardians.

— It is obvious that the power of the court to appoint a guardian

Proof of infancy before appointment. can be invoked only for the protection of persons who are legally incompetent to control themselves or their property.⁷ Hence, there must be proof of the minority before the court obtains jurisdiction to appoint a guardian to an infant; otherwise the appointment is void.⁸ And where a

10 B. Mon. 495, 507; Succession of Cass, 42 La. An. 381, 384.

¹ West Duluth v. Kurtz, 45 Minn. 380, 382.

² Neal v. Bartleson, 65 Tex. 478, 486. In Minnesota it is held that the appointment of a general guardian to a non-resident minor, though void as to the guardianship of the person, is valid as to the estate within the jurisdiction of the court making the appointment: West Duluth v. Kurtz, 45 Minn. 380, 386.

³ Maxwell v. Campbell, 45 Ind. 360, 362; Seaverns v. Gerke, 3 Sawy. 353, 364; Davis v. Hudson, 29 Minn. 27, 31.

⁴ Barnsback v. Dewey, 13 Ill. App. 581, 582; Succession of Shaw, 13 La. An. 265, and see authorities ante, § 26. The residence of the trustee of an infant *cestui que trust* is the situs of the infant's prop-

erty and confers jurisdiction: Clarke v. Cordis, 4 Allen, 466, 479.

⁵ Kurtz v. St. Paul, 48 Minn. 339, followed in Kurtz v. Duluth, 52 Minn. 140.

⁶ Matter of Nickals, 21 Nev. 462.

⁷ Ante, § 1.

⁸ State v. McLaughlin, 77 Ind. 335, holding that the appointment of a guardian to “unknown heirs” is void, because *ex vi termini* the court had no knowledge of their age, condition, or circumstances. This is true even of guardians *ad litem*: Kountz v. Davis, 34 Ark. 590, 597; Sullivan v. Sullivan, 42 Ill. 315. In appointing a guardian to an infant no inquiry is made as to the sanity of the infant, and the jurisdiction continues during the infancy of the ward, whether sane or insane: Fleming v. Johnson, 26 Ark. 421, 438.

statute authorizes the appointment of guardians to *orphans*, the court cannot appoint one to an infant having a father living.¹ For the same reason there is no authority to appoint where there is a person in existence competent to perform the functions for which the guardian is desired; so that if the law authorize the father as natural guardian to receive a legacy or other property belonging to his child, there is no necessity to appoint a guardian for such purpose, and the appointment, if made, is void.² For the same reason, courts have declined the appointment of a guardian of the persons of female infants, where their property was in the hands of a testamentary trustee who, though he never qualified as guardian, had faithfully performed for them all of the duties of that office.³ And a guardian may be appointed to a bastard on the death of its mother.⁴ This seems to have been the view of Blackstone; for he speaks of the power of a court of chancery to appoint a guardian to a fatherless child having no other guardian,⁵ and mentions that if an estate be left to an infant, the father is by common law the guardian of the person and estate, though he must account to his child for the profit.⁶ In respect of property of an infant, the law now, both in England and America, annexes to the right of the father to manage it the condition that he shall give security to have it forthcoming when the child is of age;⁷ and if he refuse, for any reason, to give such security, some other person must be appointed guardian. It is so provided by statute in most of the States.⁸ The existence of a guardian properly appointed is, self-evidently, a bar to the appointment of another, until the former is superseded in conformity with some provision of the statute;⁹ hence, the appointment of a guardian of the person and

"Orphan" means a fatherless child.

No guardian where father is competent.

But father must give bond to account for property.

There can be but one guardian in the same jurisdiction.

¹ Because the term orphan legally intends a fatherless child: *Poston v. Young*, 7 J. J. Marsh. 501; *Stewart v. Morrisson*, 38 Miss. 417, 419.

² *Wood v. Wood*, 3 Ala. 756, 761; *Hall v. Lay*, 2 Ala. 529, 531; *Succession of Forrestall*, 25 La. An. 430; *James v. Meyer*, 41 La. An. 1100, 1103; *Selden's Appeal*, 31 Conn. 548, 552.

³ *Vaccaro v. Cicalla*, 5 Pickle, 63, 79.

⁴ *Friesner v. Symonds*, 46 N. J. Eq. 521, 527.

⁵ 3 Bla. 427.

⁶ 1 Bla. 461, citing Co. Litt. 88.

⁷ *Hall v. Lay*, 2 Ala. 529; *Lang v. Pettus*, 11 Ala. 37.

⁸ See, as to the authority of the father as natural guardian, *ante*, §§ 14, 19.

⁹ *Post*, § 35. *Bledsoe v. Britt*, 6 Yerg. 458, 463; *Thomas v. Barrus*, 23 Miss. 550, 556. This is so, also, in case of a guardian *ad litem*: *Bondurant v. Sibley*, 37 Ala. 565, 571.

estate of a minor, for whom a guardian of the estate had already been appointed, operates as a valid appointment of a guardian of the person only.¹

From the right of the father, and, after his death, of the mother, to the custody of their children during minority, it results that no

No guardian of the person if father or mother be living.

guardian can be appointed of the person of an infant during the lifetime of its father or mother (unless these are declared unfit by some court of competent jurisdiction);² and hence, no guardian at all, if the

child have no property.³ The right of the parent is sufficient to prevent the appointment of a guardian of the person, although such parent have placed the custody of the child in another;⁴

Surrender by parent to one's custody no bar to power of court to appoint guardian.

and an agreement by a mother to surrender custody of her child to another does not constitute a valid claim which could control the discretion of a court in appointing, as guardian, another person.⁵ So it was held, in Tennessee, that where an executor had charge

of an estate belonging to minors as trustee, and had taken care of the persons of the minors, showing that he was a proper party to do so, it was not necessary to appoint a guardian to the minors if the trustee was willing to continue his supervision of them.⁶ But in Maryland the appointment of a guardian, by the Orphan's Court, to an infant, to whom a testator had bequeathed \$2,000 to be paid to him in case he should attain the age of twenty-one, was held valid, and the executor was ordered to keep and preserve the money.⁷

The statutes of most States provide that parents are the natural guardians of their children, entitled to the custody of their persons

Natural guardians must give bond for estate,

and management of their estates, but must give bond if the children have property of their own, in default of which a guardian (in such case sometimes called curator) will be appointed to administer the estate.⁸ If the par-

¹ *Wakefield Trust Co. v. Whaley*, 17 R. I. 760.

² *Ramsay v. Ramsay*, 20 Wis. 507; 508; *Burnet v. Burnet*, 12 B. Mon. 323, 324; *Heather Children, in re*, 50 Mich. 261; *Fields v. Law*, 2 Root, 320, 323; *Ledwith v. Ledwith*, 1 Dem. 154.

³ *Friesner v. Symonds*, 46 N. J. Eq. 521; *Morris v. Morris*, 15 N. J. Eq. 239, 240.

⁴ *Lewis, in re*, 88 N. C. 31.

⁵ *Gloucester v. Page*, 105 Mass. 231 (the mother in this case made the agreement while herself a minor); *Cook v. Bybee*, 24 Tex. 278, 281; *Dalton v. State*, 6 Blackf. 357.

⁶ *Vaccaro v. Cicalla*, 5 Pickle, 63, 80.

⁷ *Gunther v. State*, 31 Md. 21, 28.

⁸ So in Arkansas, California, Connecticut, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Missis-

ents are declared unfit to have custody of their children, a guardian is to be appointed for them whether they have property or not. There must, of course, be notice to the parents, and opportunity given them to defend at a trial of the question of their fitness, before they can be adjudged unfit.¹

It has already been mentioned, that if the infant is neither domiciled nor resident, and has no property within the jurisdiction of a court, the appointment of a guardian is nugatory.²

The appointment of a guardian to an infant with the view and for the purpose of sending it to a foreign country is erroneous, and is properly revoked by the court having made it.³

The statutes of some of the States provide that guardians may be appointed to infants whose parents are absent or absconded, with like powers as other guardians; so, for instance, in Connecticut,⁴ Indiana,⁵ New Jersey;⁶ if the statute contain no express provision touching abandonment of children by their parents, the power to appoint guardians for abandoned children is derived from the power to appoint guardians where the parents are adjudged unfit or incompetent.

Provision is made in some States for the appointment of a temporary guardian, or curator, during the vacancy in the office of guardian caused by reason of non-appointment, or failure to give bond, death, removal or suspension of a guardian, with powers, duties, and responsibilities like other general guardians. Such provision is found, *inter alia*, in Kentucky,⁷ Massachusetts,⁸ Virginia,⁹ West Virginia.¹⁰

§ 30. **Right of Infants to select their Guardians.** — The power, accorded by the common law to wards in socage, having attained the age of fourteen, of appointing a guardian of his own choice by his own act,¹¹ does not exist in America. Nor is the right

issippi, Missouri, Nebraska, North Carolina, Oregon, Texas, Vermont, West Virginia, Wisconsin, Wyoming, and probably other States.

¹ As to such notice, see *post*, § 31.

² *Ante*, § 28. See also *McLoskey v. Reid*, 4 Bradf. 334, 336, and cases cited; *Re Hosford*, 2 Redf. 168.

³ *Desribes v. Wilmer*, 69 Ala. 25, 31.

⁴ Gen. St. 1887, § 460.

⁵ St. 1888, § 2235.

⁶ Rev. 1877, p. 760, § 37.

⁷ St. 1894, § 2024.

⁸ Pub. St. 1882, ch. 139, § 6.

⁹ Code, 1887, § 2602.

¹⁰ Code, 1887, ch. 82, § 6.

¹¹ Macph. Inf. 41, on the authority of Hargrave, who refers to the case of *Rex v. Pierson*, Andr. 310, 313, in which Lord Chief Justice Lee is reported as saying: "For when the Court of Chancery appoints a guardian, such guardianship doth not cease on the ward's attaining fourteen, unless another guardian be then appointed."

Common law
right of infants
to choose a
guardian on
reaching four-
teen not recog-
nized here.

given by the common law to wards under guardianship for nurture, to select a guardian on reaching the age of fourteen, recognized in this country: guardianship for nurture exists here only in the form of guardianship by nature,¹ and no choice is allowed, in most of the States, against a father, or after his death against a mother.² The right of choice by the infant is purely statutory, so that if the statute creating it is repealed, it does not exist.³ It was held in New Hampshire, that the statute does not require notice to the father before appointing a guardian, and that therefore the failure to give such notice is not, without other error or impropriety in the appointment, a sufficient ground of appeal.⁴

Statutory right
to nominate,
subject to con-
firmation by
court.

The right of nominating to the court the person to be appointed guardian is affirmatively granted to infants over fourteen years of age in probably all of the States, coupled, mostly, with the proviso, that such nominee shall be confirmed by the court if deemed suitable. Such provision has been construed to mean, that the person who receives the appointment must be one who has been first nominated by the infant, if above fourteen years of age, but does not oblige the court to appoint a guardian because the infant demands it, although the person nominated be not objectionable, if no necessity is shown for a guardian.⁵ The discretion of the court to confirm the

And so it is of a guardianship in socage; though at that age the ward hath a right to chuse another guardian." And see Macph. 77, as to the mode in which the appointment by the infant is made.

¹ See *ante*, § 19.

² *Beard v. Dean*, 64 Ga. 258.

³ *Mauro v. Ritchie*, 3 Cr. C. C. 147, 165; *Smoot v. Bell*, 3 Cr. C. C. 343. Says Cranch, Ch. J., in *Mauro v. Ritchie*, *supra* (p. 165): "And it was not without reason that the legislature thought proper to transfer the right of election from the infant to the Orphan's Court. At the age of fourteen the infant begins to be restless and ungovernable, and the salutary restraints of the guardian are irksome. The infant is apt to think his guardian penurious and tyrannical. He wants greater indulgences; and there are always artful and insinuating men enough, who are eager to grasp all the property they can

lay hold of, and who, taking advantage of these dispositions in the infant, will stimulate his restlessness, excite his suspicions, undermine the authority of the guardian, and finally prevail on the infant, in his simplicity, to place his property in their hands. The chance of evil resulting from the infant's right of election, seems greater than the chance of good; and the choice of the court is more likely to be judicious than that of the infant."

⁴ *Waldron v. Woodman*, 58 N. H. 15.

⁵ *Ledwith v. Ledwith*, 1 Dem. 154. The reasoning employed in the opinion seems to show that the decision rests upon the principle that an infant cannot choose a guardian while his parents are living, unless these are judicially declared incompetent, or refuse to act. See *Beard v. Dean*, *supra*; *Lefever v. Lefever*, 6 Md. 472; *Fridge v. State*, 3 Gill & J. 103, 112.

nominee of the infant is not to be exercised arbitrarily, so as to enable the judge to compel the eventual nomination of a person preferred by him, and thus to destroy the infant's right of selection, but is limited to the decision of the question whether the person nominated is a proper or suitable one for the office; and this decision must be based upon facts known by or proved to the court, and is mostly reviewable on appeal.¹ The judge should consider the interest, rather than the wishes, of the infant.²

Discretion to confirm is not arbitrary.

With the exceptions to be noted *infra*, the right of the minor to choose his guardian accrues to him, in most States, on attaining the age of fourteen years, whether a guardian has previously been appointed to him by the court or not, subject, of course, to the rejection by the court if the selection be unwise or improvident.³ It is held in some States that since the selection of a new guardian on reaching the age of fourteen is the exercise of a right vested in the ward by law, the former guardianship is thereby *eo ipso* terminated,⁴ so that it is not necessary to give notice to the former guardian, because he is not allowed to show any cause to the contrary;⁵ while in others the appointment of the new guardian is held invalid unless notice be given to the guardian to be superseded,⁶ and his authority revoked.⁷ It is provided, in some States, that if, after the appointment of a guardian to a minor, his residence is changed to another county in the same State, the ward may exercise his right of election in the latter county, and the proper court of such county has jurisdiction to make the appointment and order the transmission of the papers, etc., from the court in which the original appointment was made.⁸

Wards may choose new guardian on reaching fourteen,

without notice to the existing guardian.

Or on giving such notice

in the county of the minor's residence.

The right to nominate a guardian does not, however, include the right to displace one already appointed, unless such right is

¹ Grant v. Whitaker, 1 Murphy, 231; Adam's Appeal, 38 Conn. 304; Lunt v. Aubens, 39 Me. 392; Bryce v. Wynn, 50 Ga. 332. As to appeal, see *post*, §§ 35, 112.

² Compton v. Compton, 2 Gill, 241, 253.

³ Sessions v. Kell, 30 Miss. 458, 463. The court has no right to appoint, unless the ward is incompetent to exercise his right: Arthur's Appeal, 1 Grant's Cas. 55.

⁴ Estate of Lewry, 12 Phila. 120.

⁵ Kelly v. Smith, 15 Ala. 687.

⁶ Because he may controvert the age of the ward: Montgomery v. Smith, 3 Dana, 599.

⁷ Inferior Court v. Cherry, 14 Ga. 594; Bryce v. Wynn, 50 Ga. 332.

⁸ Rev. St. Mo. 1889, § 5291; Marheineke v. Grothaus, 72 Mo. 204; *Ex parte* Bartlett, 4 Bradf. 221.

Such right is given by the statute;¹ the removal of a guardian, for statutory. no other cause than the choice of another by the ward, and without notice to him, has been held a nullity.² Of course the ward is bound by the choice once made, and will not be allowed to supersede his guardian as often as his fancy changes.³

The right to choose another guardian on reaching the age of fourteen years does not extend to wards who have a guardian appointed in chancery,⁴ or a testamentary guardian.⁵ It is provided by statute in most States, that where a testamentary guardian has been duly appointed, the ward cannot choose another guardian, either before or after attaining the age of fourteen.⁶

Choice should be made in open court, unless otherwise provided by statute. The right of choice by an infant should, for obvious reasons, be exercised in open court, or, if appointment of a guardian is authorized in chambers, then in presence of the judge who is to make the appointment.⁷ In some of the States stringent regulations exist in this respect. In Michigan, the choice must be made in open court, unless the minor live more than ten miles from the place where the court is held, in which case the choice may be indicated in writing signed by himself and certified by a justice of the peace or township clerk, or, if absent from the State, by any civil or military officer holding commission from the President or governor.⁸ The law in Nebraska is substantially the same.⁹ In Kentucky, the choice is before the court, or by writing in presence of the judge;¹⁰ in Massachusetts, by writing certified by a justice of the peace,¹¹ and, in Maine, by nominating in presence of the judge or register of probate, or in writing certified by a justice of

¹ *Ham v. Ham*, 15 Gratt. 74; *Mauro v. Ritchie*, 3 Cr. C. C. 147, 165; *Gray's Appeal*, 96 Pa. St. 243, following *McCann's Appeal*, 49 Pa. St. 304; *Estate of Berryman*, 17 Phila. 463.

² *Dibble v. Dibble*, 8 Ind. 307.

³ *Lee's Appeal*, 27 Pa. St. 229, 233.

⁴ *Dyer's Case*, 5 Pai. 534; *Matter of Nicoll*, 1 Johns. Ch. 25.

⁵ *Matter of Reynolds*, 11 Hun, 41, 42; *Arthur's Appeal*, 1 Grant's Cas. 55, 57; *Sessions v. Kell*, 30 Miss. 458, 464; *Robinson v. Zollinger*, 9 Watts, 169.

⁶ So, for instance, in Arkansas, Delaware, Indiana, Minnesota, Missouri, Texas;

in many States the right of changing the testamentary guardian on reaching fourteen is excluded by giving the right only in cases where the former guardian was appointed by the court. The right is also excluded by all statutes modelled after that of Car. II. which authorizes the father to appoint the testamentary guardian for the period of the child's minority.

⁷ *Burrows v. Bailey*, 34 Mich. 64, 67.

⁸ Ann. St. Mich. 1882, § 6305.

⁹ Comp. St. 1891, ch. 34, § 5.

¹⁰ Gen. St. 1887, ch. 48, Art. I. § 7.

¹¹ Gen. St. ch. 139, § 3.

the peace.¹ In Indiana, the selection may be proved without the presence of the minor in court.² In Ohio, female infants are admitted to election of their guardians at the age of twelve, males at fourteen.³ Unless the court deem best, different persons cannot be chosen as guardians of the person and of the estate.⁴

Females choose at twelve in Ohio.

§ 31. **Right of Parents to Preference in the Appointment.** — That no guardian can be appointed of the person of an infant having father or mother living not declared unsuitable by a court of competent jurisdiction, nor a guardian or curator to an infant whose father or mother is entitled, under the law, to take charge of its estate as natural guardian, has already been pointed out as the law in most States.⁵

But parents may be adjudged incompetent or unfit to have the custody, care, and education of their children in proceedings for that purpose by a court having jurisdiction, in which proceeding the parents must be made parties by notice to them enabling them to appear and be heard, unless they appear voluntarily.⁶ It is a fraud on the rights of a father to obtain guardianship of his child without his knowledge;⁷ and the appointment of a guardian to an illegitimate child,⁸ or to a legitimate child after its father's death, without notice to the mother, is void.⁹ In America, the right of a mother to the custody of her infant children is not interfered with except for strong reasons.¹⁰

Parents may be declared unfit,

if made parties for that purpose,

but not without notice to them.

The unfitness of parents to be the natural guardians of their children may, if no other course of proceeding is pointed out by statute, be declared or adjudged by the court as an incident to the appointment of a guardian, if they had due notice of the application, or appear thereto in person or by attorney; for the welfare of the child is

Incompetency of parents may be declared as an incident in appointing a guardian.

¹ Rev. St. 1883, ch. 67, § 2.

² St. 1888, § 2513.

³ And it is held that the appointment expires by its own limitation, so that all acts of one who was appointed guardian to a female under the age of twelve years after she has attained that age are void: *Perry v. Brainard*, 11 Ohio, 442; *Campbell v. English*, Wright, 119.

⁴ Rev. St. 1890, § 6257.

⁵ *Ante*, § 29 (p. 90). And see as to

the rights of parents as natural guardians, *ante*, §§ 14, 19.

⁶ *Sensemann's Appeal*, 21 Pa. St. 331; *Bowles v. Dixon*, 32 Ark. 92, 96; *Bryan v. Lyon*, 104 Ind. 227, 234.

⁷ *Tong v. Marvin*, 26 Mich. 35.

⁸ *Dalton v. State*, 6 Blackf. 357.

⁹ *Ramsay v. Ramsay*, 20 Wis. 507.

¹⁰ *Eldridge v. Lippincott*, 1 N. J. L. 397; *Peacock v. Peacock*, 61 Me. 211.

the paramount consideration in the appointment of a guardian,¹ as it is in determining the right of custody in chancery or on *habeas corpus*.² But it is said that courts are unwilling to assume jurisdiction where the father of an infant is living;³ chancery, in England, will displace a father in the control of his child only "under very peculiar circumstances."⁴

It is obvious, then, that whenever it becomes necessary to appoint a guardian or curator to an infant, the father, not adjudged or found by the court to be unfit, has the right to be appointed if he desires and will give the bond that may be required; the statute so provides in Alabama,⁵ Arkansas,⁶ California,⁷ Colorado,⁸ Connecticut,⁹ Dakota,¹⁰ Idaho,¹¹ Iowa,¹² Kansas,¹³ Kentucky,¹⁴ Missouri,¹⁵ Nevada,¹⁶ Oregon,¹⁷ Wyoming,¹⁸ and probably most other States, independently of the provisions, also found in the statutes of most of the States, giving to the father, and after his death to the mother, the right of custody, care, and education of their children.

The preference given to the mother of an illegitimate over the putative father results from the rule discussed in connection with the status of illegitimates,¹⁹ and is recog-

Father's right
to appoint-
ment.

Statutes.

Mother of
illegitimate.

¹ *Redman v. Chance*, 32 Md. 42, 50; *Allen v. Peete*, 25 Miss. 29; *Griffin v. Sarsfield*, 2 Dem. 4; *Prime v. Foote*, 63 N. H. 52; *Heinemann's Appeal*, 96 Pa. St. 112; *Adams v. Specht*, 40 Kans. 387, 390. In *Hine v. Nixon*, 6 Port. 77, the reporter announces in the syllabus, as the opinion of the court, that "it is competent for the County Court to set aside the claim of a father to the wardship of his child's estate, in favor of a stranger, if it appear that the father is unfit for the station;" but in the later case of *Hall v. Lay*, 2 Ala. 529, 534, the court point out that while such words were employed by way of illustration (improperly, however), the point decided was only that the mother has no such exclusive right to the wardship of her child, after the father's death, as to avoid the appointment of another guardian by the County Court. It is held, in the latter case, that under the statute then in force the Court of Chancery was the only court in Alabama that could "under some very peculiar circumstances" divest the

father of his natural right to the custody and control of his children, or to provide for the security of their estate.

² See *ante*, § 7, as to the rights of parents to the custody of their children.

³ Schoul. Dom. Rel. § 304.

⁴ Per Lord Chancellor Hart, in *Barry v. Barry*, 1 Moll. 210; *Ball v. Ball*, 2 Sim. 35; *Spence, in re*, 2 Phillips, 247, 252.

⁵ Code Civ. 1887, § 2372.

⁶ Dig. St. 1894, § 3568.

⁷ Code Civ. Pr. 1885, § 1751.

⁸ Mills' Ann. St. 1891, § 2074.

⁹ Gen. St. 1887, § 456.

¹⁰ Comp. Terr. L. § 5987.

¹¹ Rev. St. 1887, § 5774.

¹² Code, 1888, § 3433.

¹³ Gen. St. 1889, § 3221.

¹⁴ Gen. St. 1887, ch. 48, § 6.

¹⁵ Rev. St. 1889, § 5279.

¹⁶ Gen. St. 1885, § 552.

¹⁷ "The Nearest Relation:" Code, 1887, § 2879.

¹⁸ Rev. St. 1887, § 2253.

¹⁹ *Ante*, § 12.

nized by the statutes of most States.¹ But a statute directing that "in all cases not otherwise provided for by law, the father, while living, . . . and when there shall be no lawful father, then the mother, if living, shall be entitled to the guardianship of their minor children," is construed to recognize, by implication, the right of the putative father, on the death of the mother, to the guardianship of their illegitimate offspring.²

Father of illegitimate after mother's death.

The mother is, by statutory provision in most States, entitled to the guardianship of her minor children after the father's death, or when the father has been declared unfit. Her claim to this right, even without direct declaration by statute, cannot be disregarded except for satisfactory reasons.³ She is, when not herself unworthy, the most suitable person to be appointed.⁴ A statute giving preference first to the father, then to the mother "if unmarried," and directing the court not to disregard that order "unless it deems that prudence and the interest of the infant so require" is construed as not avoiding female guardianship by marriage, nor incapacitating a married mother to be the guardian of her fatherless infant by a former husband; but, on the contrary, as preferring her to all others in the matter of precedence.⁵ Even if the mother have refused to qualify, and another person have been appointed guardian, she may, after the death of the person so appointed, although she have remarried, give bond and qualify with the consent of her second husband.⁶

Mother's right to appointment.

At common law the right of the mother to be appointed guardian was much restricted, notably by the guardianship in chivalry, and after its abrogation by the statutes creating testamentary guardianship.⁷ The principle of the latter statute⁸ is still recognized in some of the States,⁹ and the right of the mother to the guardianship of her infant children accordingly limited. But the tendency is, in all the States, to remove these limitations, and to recognize the right of the mother as equal to that of

¹ See, also, *ante*, § 20, in connection with testamentary guardians.

² *Barela v. Roberts*, 34 Tex. 554, 557.

³ *Eldridge v. Lippincott*, 1 N. J. L. 397; *Albert v. Perry*, 14 N. J. Eq. 540, 542; *Read v. Drake*, 2 N. J. Eq. 78.

⁴ *Isaacs v. Taylor*, 3 Dana, 600, 601; *Burmester v. Orth*, 5 Redf. 259, 261.

⁵ *Leavel v. Bettis*, 3 Bush, 74.

⁶ *Jarrett v. State*, 5 Gill & J. 27.

⁷ Concerning which, see *ante*, §§ 14, 15.

⁸ 12 Car. II. ch. 24.

⁹ See *ante*, § 20

the father, and in case of his death or incapacity, superior to the rights of any other person.¹

§ 32. **Considerations determining the Selection.** — The discretion of courts in the appointment of guardians to minors is not to be exercised arbitrarily or capriciously, but in conformity with fixed principles of law. One of these is, as stated in the preceding section, and as emphasized by statute in most States, that the father, and where there is no lawful father, the mother (with the exceptions noted), is entitled to be appointed guardian of their

own children, unless adjudged incompetent or unsuitable. After the parents the next of kin are preferred as guardians of children under fourteen, or of children over fourteen who do not determine their guardian by their own choice. Where these preferences are indicated by statute they cannot be disregarded, but for sufficient reasons appearing to the court.² The appointment of a stranger, where a relative also applies who is not shown to be unsuitable,³ is error, which will be reversed on appeal.

But while the rights of parents yield only to the welfare of their children, demanding moral and mental culture, proper education and discipline, so that a stranger will be appointed guardian only if it be necessary to protect the ward against immoral and vicious influences, greater latitude of discretion is allowed as between relations having no legal claim to the services of the infant. A reason which might not be sufficient to bar the legal rights of the parent might suffice to decide the question as between the claims of other relatives.⁴

The leading, indeed the paramount, consideration constituting the rule of choice among relatives other than parents, is the welfare of the child.⁵ In pronouncing upon the question of its best interests the court will take into view not merely its temporary welfare, but the state of

¹ See remarks of Lord, J., quoted *ante*, p. 59.

² *Albert v. Perry*, 14 N. J. Eq. 540, 542; *Allen v. Peete*, 25 Miss. 29; *Johnson v. Kelly*, 44 Ga. 485, 487 (this case is that of an idiot, involving, however, the same principles as are applicable to minors); *Am. & Eng. Enc. of Law*, vol. 9, p. 92, note 2.

³ *Spaun v. Collins*, 10 Sm. & M. 624, 626; *Morehouse v. Cook*, Hopk. Ch. 226; *Matter of Winkleman*, 9 Nev. 303.

⁴ *Albert v. Perry*, 14 N. J. Eq. 540, 543.

⁵ *Schoul. Dom. Rel.* § 305, p. 487; *Compton v. Compton*, 2 Gill, 241, 253.

its affections, attachments, its training, education, and morals.¹ Considerations of this kind, especially when reinforced by the dying request of the parent, may give a stranger in blood preference over one next of kin.²

to secure which a stranger may be preferred.

Where it plainly appears that the pecuniary interests of the child will be promoted by giving the child to the wealthier of the applicants, this fact may be considered by the jury.³ The provision introduced in the statutes of some States directing that a minor shall not be committed to the guardianship of a person of religious persuasion different from that of the parents,⁴ is meant to secure, so far, the absolute equality before the law of all forms of religious faith, in view of the practice in some countries of seeking to strengthen the dominant faith by means of the compulsory custody of the young. It does not militate against the appointment of a guardian of different religious faith, unless it appear that a person of the same faith, suitable otherwise and as near and as interested in the welfare of the child, had offered to take it.⁵ But the wishes of the parents in this respect must be regarded, and if not expressed, are presumed to be to have their children educated in their own faith.⁶

Persons of the religious persuasion of parents preferred,

if one such offers that is otherwise suitable.

In the absence of some statutory provision, relatives other than parents, no matter how near in blood, cannot claim the guardianship as a matter of right.⁷ But they may make themselves parties to assist the court in making choice of a proper person as guardian;⁸ and it is the duty of the court to cause notice to be given to all relatives that may be able to furnish such information concerning the interests of a minor, under fourteen years of age, as may guide it to best exercise its discretion to protect the child.⁹ One who, having a prior right to be appointed guardian, waives the same by consenting to the appointment of another, will not thereafter

Relatives have no exclusive right to be appointed,

but should be consulted.

One having waived cannot afterward claim preference.

¹ *Foster v. Mott*, 3 Bradf. 409, 412.

² *Cleghorn v. Janes*, 68 Ga. 87, 92.

³ *Walton v. Twiggs*, 91 Ga. 90.

⁴ As, for instance, in Missouri: Rev. St. 1889, § 5295; Pennsylvania: Br. Purd. Dig. 1885, p. 513, § 35.

⁵ *Voullaire v. Voullaire*, 45 Mo. 602, 606; *In re Doyle*, 16 Mo. App. 159 (stating same principle in a *habeas corpus* proceeding), 166; *Nicholson's Appeal*, 20 Pa.

St. 50, 54; *McCann's Appeal*, 49 Pa. St. 304, 306.

⁶ *Turner, in re*, 19 N. J. Eq. 433, 435.

⁷ *Watson v. Warnock*, 31 Ga. 716, 718; *Taff v. Hosmer*, 14 Mich. 249, 255.

⁸ *Taff v. Hosmer*, 14 Mich. 249, 258.

⁹ *Underhill v. Dennis*, 9 Pai. 202, 206; *Cozine v. Horn*, 1 Bradf. 145; *Morehouse v. Cook*, Hopk. 226; *Matter of Feely*, 4 Redf. 306, 308.

be heard to ask the removal of the latter so as to be appointed himself.¹

A guardian of the estate of a minor should be selected for his good character, sound judgment, prudence, and adaptedness to the trust. He must safely keep the funds, and at the same time make them productive. The safety of the funds, and the interest of his ward, should be the sole guiding principle in the administration of his trust. It is, therefore, an abuse of the power of the court to appoint a person of known insolvency, who is instigated to apply for letters by the officers of a banking company who propose to become his sureties; because, whatever may be the prearrangement between the company and the guardian in such case, — even if he have not placed himself under obligation to make a particular disposition of the funds, — the tendency of such complications is to destroy the personal disinterestedness of the trust, and to warp the judgment of the trustee by personal interest or social obligation, if not by a more controlling exigency.²

No person should be appointed whose property interests may conflict with those of the ward.³ Hence, a grandfather not interested in the succession is to be preferred to a mother's husband whose wife takes property in common with the infant;⁴ and a trust company is preferred to a maternal grandmother who lives on the minor's estate and hopes to be partially supported out of his property.⁵ An executor has been described as "the least competent person on earth who should be the guardian" of a legatee;⁶ and an administrator should not be appointed guardian to an heir of the estate he is administering;⁷ such appointment is under the statutes of some of the States void.⁸ So where a plaintiff had been appointed guardian of an infant defendant, the court directed his bill to be dismissed, unless he resigned his guardianship;⁹ and

¹ *Kahn v. Israelson*, 62 Tex. 221, 226, modifying the decision in *Cook v. Bybee*, 24 Tex. 278, according to a modification of the statute.

² Per Stone, J., in *Lee v. Lee*, 67 Ala. 406, 414.

³ *Barnsback v. Dewey*, 13 Ill. App. 581, 584; *Sensemann's Appeal*, 21 Pa. St. 331, 334.

⁴ *Massingale v. Tate*, 4 Hayw. 30.

⁵ *Brien, in re*, 11 N. Y. Supp. 522.

⁶ Robertson, Ch. J., in *Isaacs v. Taylor*, 3 Dana, 600, 601.

⁷ *Ex parte Crutchfield*, 3 Yerg. 336.

⁸ *Sawyer v. Knowles*, 33 Me. 208; *Scobey v. Gano*, 35 Oh. St. 550; *Dull's Appeal*, 108 Pa. St. 604, but such an appointment will not, after the lapse of ten years, be revoked at the instance of one whose property interest is adverse to that of the ward, if the guardian has acted in good faith: p. 606.

⁹ *Smith v. Dudley*, 1 Dev. Eq. 354.

a defendant was not allowed to prove that he had, after action brought, been chosen as guardian of the person and estate of one of the plaintiffs.¹ But the fact that one has received money belonging to a minor, for which he will be obliged to account, does not disqualify him from appointment as tutor to such minor.² It has been held that, other things being equal, a prospective early necessity for a new appointment may be regarded as militating against a proposed selection,³ and that the applicant is the trustee to expend the income of an estate for the infant's support and education, is a circumstance in his favor.⁴ The fact, however, that an infant's estate came to him from the father affords no ground to prefer paternal relations over those on the maternal side of the same degree of affinity or consanguinity,⁵ nor are the wish and expectation of one who gave the child \$5,000 decisive as to who should be the child's guardian.⁶

One with whom the child has had a home, where it has been properly treated and cared for, should be preferred over one whose appointment would necessitate its removal to a new home.⁷ So the separation of children of tender years from one another, or from those to whom they have become attached, should be avoided unless their true interests peremptorily require it.⁸ And the wishes of the child itself, although under the age of fourteen, may be consulted.⁹

The appointment of joint guardians to an infant of tender years, each to have the alternate custody every six months, where one of them is a proper and unobjectionable party, should be avoided.¹⁰

It happens, sometimes, that a father or mother, intending to appoint a testamentary guardian, fails in this purpose by reason of informality of the instrument or some technical defect in its execution barring it from probate. In all such cases, the choice indicated will carry great weight in influencing the selection to be made by the judge or

Preference and wishes of the child may be considered.

Invalid testamentary appointment by a parent may determine choice.

¹ *Lahiffe v. Hunter*, Harp. 184.

² *Succession of Fuqua*, 27 La. An. 271, 273.

³ *Bennett v. Byrne*, 2 Barb. Ch. 216, 219.

⁴ *Bennett v. Byrne*, *supra*.

⁵ *Underhill v. Dennis*, 9 Pai. 202, 208; *Albert v. Perry*, 14 N. J. Eq. 540, 544.

⁶ *Waldron v. Woodman*, 58 N. H. 15.

⁷ *Albert v. Perry*, *supra*; *Matter of De Marcellin*, 4 Redf. 299, 301; *Burmester*

v. Orth, 5 Redf. 259, 262, preferring one with whom the father had placed the child to its mother, who was deemed unfit.

⁸ *Cozine v. Horn*, 1 Bradf. 143, 145; *Matter of De Marcellin*, 4 Redf. 299, 301; *Foster v. Mott*, 3 Bradf. 409, 413.

⁹ *Matter of De Marcellin*, *supra*; *Albert v. Perry*, 14 N. J. Eq. 540, 545; *Walton v. Twiggs*, 91 Ga. 90;

¹⁰ *Matter of Annan*, 26 N. Y. Supp. 258.

Chancellor in appointing the guardian, and, other things being equal, will determine the choice.¹ So, too, the dying wishes and requests of parents are proper to be considered in determining an application, and should turn the scales in favor of the person so recommended, if not unfit for the trust.²

While the views of parents will have the greatest weight upon points on which there is fair ground for difference of opinion, yet a whim or caprice, hostility against a particular person when not based upon substantial grounds, or prejudice recognizable as such, should not be allowed to stand in the way of an appointment in other respects desirable for the best interests of the child. Hence, it is the duty of the court to examine into the conclusions of the parent, to determine, if possible, whether well founded or such as to command approval.³ Where the parent is unfitted, mentally or morally, for the proper care and training of a child, or where the preference given may have been influenced by pressure of poverty, or by other circumstances which have ceased to exist, the wishes of such a parent are entitled to little or no consideration.⁴ The interest of the minor is the paramount consideration; although the parental request ought to prevail in the absence of good reasons to the contrary, it is not conclusive and must be disregarded when the interests of the ward plainly require it.⁵

§ 33. **Disqualifications for the Office of Guardian.** — Whatever doubt may have existed under the common law as to the competency of a married woman to be the guardian of the person of her own children, or of other infants, there is no doubt of the tendency, in America, to abolish all distinction in this respect between the sexes, and between married and unmarried women. In respect of the guardianship of their estate, or curatorship, there is a similar tendency observ-

¹ *Foster v. Mott*, 3 Bradf. 409, 412; *Succession of Fuqua*, 27 La. An. 271, 273; *Griffin v. Sarsfield*, 2 Dem. 4, 13 (appointing the mother's testamentary nominee, such appointment being held void under the statute, and deeming the father an improper person); *Matter of Johnson*, 87 Iowa, 130, 135.

² *Watson v. Warnock*, 31 Ga. 716, 719; *Turner, in re*, 19 N. J. Eq. 433; *Badenhoof*

v. Johnson, 11 Nev. 87, 88; *Janes v. Cleghorn*, 63 Ga. 335, 338; *Cleghorn v. Janes*, 68 Ga. 87; *Matter of De Marcellin*, 4 Redf. 299, 301; *Bennett v. Byrne*, 2 Barb. Ch. 216, 220; *Cozine v. Horn*, 1 Bradf. 143, 144; *Underhill v. Dennis*, 9 Pai. 202, 209; *Burmester v. Orth*, 5 Redf. 259.

³ *Foster v. Mott*, 3 Bradf. 409, 412.

⁴ *Albert v. Perry*, 14 N. J. Eq. 540, 544.

⁵ *Badenhoof v. Johnson*, 11 Nev. 87.

able, though the disability of married women remains in many States. Statutes in some States authorize married women to act as guardians of the person, but not of the estate.¹ In such cases the marriage of a curatrix, or female guardian of the estate of a minor, has been held to *ipso facto* terminate her authority without an order of removal;² but the Supreme Court of Alabama announce the law to be (in determining the status of a guardian in another State) that while the marriage of a female guardian may authorize proceedings for her removal, it would not, of itself, terminate the guardianship; and where, in such case, the assent of the husband is necessary to the continuance of the guardianship, it will be presumed in the absence of evidence to the contrary.³ It is held in Vermont, that the marriage of a female guardian, at the moment of its consummation, extinguishes her right and authority as such,⁴ but until the decree of the Probate Court having made the appointment is reversed, it cannot be collaterally questioned.⁵ The Kentucky statute, authorizing the appointment of a mother as guardian "if unmarried,"⁶ is construed as not avoiding female guardianship by marriage, but, on the contrary, as clearly implying the preference of the mother over all others.⁷ In Louisiana, the mother becomes tutrix of her children on the father's death; if she contemplates marriage and desires to remain tutrix, she must apply for the convocation of a family meeting which decides on her right; but if she marry without such convocation, she is *ipso facto* deprived of her tutorship.⁸ The statutes of Massachusetts,⁹ Minnesota,¹⁰ Montana,¹¹ New Hampshire,¹² New York,¹³ and Texas,¹⁴ affirmatively enable

Married woman may be guardian of person and not of estate.

Marriage as terminating guardianship of a *feme sole*.

Statutory provisions touching competency of married women.

¹ For instance, in Arkansas: Dig. 1894, § 3589; Missouri: Rev. St. 1889, § 5292.

² Carr v. Spannagel, 4 Mo. App. 284, 288, holding, however, that the fact of marriage without an order of removal could not be shown in a collateral proceeding, and would not vitiate a sale made after such marriage, before it became known to the purchaser.

³ Carlisle v. Tuttle, 30 Ala. 613, 624.

⁴ Field v. Torrey, 7 Vt. 372, 386; Farrar v. Olmstead, 24 Vt. 123, 125. But by the St. of 1894, § 2815, her marriage does not, as such, extinguish her authority.

⁵ Farrar v. Olmstead, 24 Vt. 123, 126.

⁶ Gen. St. 1887, ch. 48, § 6.

⁷ Leavel v. Bettis, 3 Bush, 74, 76; Cotton v. Wolf, 14 Bush, 238, 248.

⁸ Keene v. Guier, 27 La. An. 232.

⁹ Pub. St. 1882, ch. 147, § 5.

¹⁰ Gen. St. 1881, ch. 59, § 5.

¹¹ Comp. St. 1888, Prob. Pr. Act, ch. 3, § 60.

¹² Pub. St. N. H. 1891, ch. 178, § 4.

¹³ Rev. St. N. Y. (7th ed.), by Throop, p. 2292, § 2.

¹⁴ So it appears from the provision enabling a married woman to give bond

a married woman to be guardian; while in California¹ and Nevada² the appointment of a mother is conditioned upon her being unmarried; and the statute peremptorily forbids the appointment of a married woman as guardian, and vacates the authority of a female guardian on her marriage, in Maine;³ so in Ohio,⁴ Vermont,⁵ and West Virginia.⁶ In Indiana, a married woman may be guardian if her husband is also a fit person;⁷ but the husband's consent does not become necessary on his marrying a female guardian.⁸ So the marriage of a female guardian may have the effect of joining the husband with her in the guardianship;⁹ and since a married woman is presumed to be under the control of her husband, she should not be appointed guardian unless her husband is also a suitable person as guardian.¹⁰ Marriage is held to be no disqualification in New York,¹¹ Mississippi,¹² and Georgia;¹³ and in some early cases it was held that the bond of a married woman, as guardian, with sureties, will be held valid, although she is by law incompetent to execute a bond.¹⁴

The appointment of non-residents is prohibited by statute in many of the States,¹⁵ among them Arkansas,¹⁶ Dakota,¹⁷ Illinois,¹⁸

as guardian in the absence, or without the consent, of her husband: Rev. St. 1895, § 2604.

¹ C. C. Procedure, § 1751. By an amendment of March 19, 1891, the father or mother of a child under fourteen, if found competent, has preference to be appointed guardian. The nominee of a minor over fourteen, if found competent, has preference, whether married or unmarried. The authority of a guardian is not affected by marriage: Statutes and Amendments to the Code, 1891, p. 136.

² Gen. St. 1885, § 552.

³ Gen. St. 1883, ch. 67, § 20.

⁴ Rev. St. 1890, § 6292.

⁵ Rev. L. 1880, § 2497, changed by Statutes of 1894, *supra*.

⁶ Code, 1887, ch. 72, § 7.

⁷ *Ex parte Maxwell*, 19 Ind. 88.

⁸ *Hardin v. Helton*, 50 Ind. 319, 322.

⁹ *Martin v. Foster*, 38 Ala. 688, 690; *Wood v. Stafford*, 50 Miss. 370, 374.

¹⁰ *Ex parte Maxwell*, 19 Ind. 88; *Kettletas v. Gardner*, 1 Paige, 488.

¹¹ Whether of the person or of property: *Matter of Hermance*, 2 Dem. 1, holding

the case of *Holley v. Chamberlain*, 1 Redf. 333 (declaring married women incompetent as guardians of the estate), to be deprived of its authority by statute of 1867, ch. 782, §§ 2, 6, which declares married women to be capable of acting as guardians, as though they were single women.

¹² *Farrer v. Clark*, 29 Miss. 195, 201.

¹³ *Beard v. Dean*, 64 Ga. 258.

¹⁴ *Jarrett v. State*, 5 Gill & J. 27; *Palmer v. Oakley*, 2 Doug. 433, 456, holding, also, that although it is incompetent to grant guardianship to a *feme covert*, yet "if granted, the acts of the guardian, within the scope of his powers, will be binding and obligatory, and afford full and ample protection to third persons dealing with him:" p. 463.

¹⁵ *Schoul. Dom. Rel.* § 306, p. 490.

¹⁶ St. 1894, § 3590.

¹⁷ Comp. L. 1887, § 2650, directing the Probate Court to remove guardians for removal from the territory.

¹⁸ *Hurd's Rev. St.* 1891, ch. 64, § 1, must be inhabitants of the same county with their wards.

Iowa,¹ Kansas,² Kentucky,³ Louisiana,⁴ Missouri,⁵ Montana,⁶ Ohio,⁷ Rhode Island,⁸ and Vermont;⁹ in which State non-resident guardians may resign.¹⁰ In Alabama, the appointment of a non-resident guardian is held not void, but good until revoked.¹¹ In Maine, non-residence is held no disqualification in a guardian;¹² but in New York the statute declaring a non-resident alien incompetent to serve as executor was held a legislative indication of the incompetency of a non-resident to serve as guardian;¹³ and that a non-resident father, not chosen by the son when of age to choose, and although such father was guardian of the son in another State, would not necessarily be appointed guardian in New York.¹⁴ It is said that cases are rare in which it would be for the advantage of an infant to appoint a resident of another State for his guardian.¹⁵ Remembering that it is the duty of a guardian of the person to inculcate habits of sobriety and industry upon his ward, and to superintend his education, requiring his personal surveillance; that the guardian of the estate should give his personal attention to the proper management of his ward's property; and that it may frequently be necessary for the court to cite him before it for the purpose of accounting, or to compel other action for the benefit of the ward, which cannot be conveniently done when the guardian resides in another State to which its process does not reach,—the impropriety of appointing a non-resident guardian, except in cases of extreme peculiarity, becomes apparent even in the absence of a statutory inhibition.¹⁶

Incompetence
of non-
residents.

Impropriety of
appointing
non-residents
as guardians.

¹ As inferable from Miller's Rev. An. Code, 1886, § 2266, authorizing the appointment of the non-resident guardian of a non-resident minor.

² By inference from Gen. St. 1889, § 3238, authorizing the appointment of the foreign guardian of a non-resident minor.

³ Gen. St. 1894, § 2024, requiring the court to remove a guardian who has moved out of the State.

⁴ Succession of Bookter, 18 La. An. 157.

⁵ Rev. St. 1889, § 5293. It is held in this State, that a statute avoiding guardianship by the guardian's removal from the State authorizes the revocation of his authority, although passed after his ap-

pointment: *Finney v. State*, 9 Mo. 227, 230.

⁶ Non-resident guardian to be removed: Prob. Code 1895, § 347, ¶ 6.

⁷ Removal from the State of itself determines the authority of a guardian: Rev. St. 1889, § 6272.

⁸ Pub. St. 1882, ch. 168, § 11 (allowing, however, the appointment of a non-resident guardian by will).

⁹ Rev. L. 1880, § 2497.

¹⁰ St. 1894, § 2815.

¹¹ *Martin v. Tally*, 72 Ala. 23, 29.

¹² *Berry v. Johnson*, 53 Me. 401.

¹³ *Matter of Taylor*, 3 Redf. 259.

¹⁴ *Johnson v. Borden*, 4 Dem. 36.

¹⁵ Schoul. Dom. Rel. § 306, p. 490.

¹⁶ *Speight v. Knight*, 11 Ala. 461, 463;

It was held in England that a partnership cannot be appointed guardians,¹ although they might be named executors, the authority vesting in the individuals constituting the firm at the time ;² and so corporations are held ineligible as guardians in the absence of statutory authorization.³ But corporations now exist in more than one half of the States which are authorized by law to qualify and act as guardians, as well as in other fiduciary capacities.⁴

Since the judgment of a judge who has an interest in the matter adjudicated is void, no judge can appoint himself as guardian, nor a court one of its own members.⁵

Where one who has been removed from the office of guardian obtains letters of guardianship in another county by concealing the fact of his removal, such letters may be declared void *ab initio*.⁶

That in America the presumptive heir of an infant is not disqualified from being appointed his guardian, has been mentioned in an earlier chapter.⁷ A statute in Texas providing that "in case the orphan has no ascendant in the direct line, the guardianship shall be given to the nearest of kin in the collateral line who comes immediately after the heir," is construed as not disqualifying the presumptive heir in any case, but as simply postponing the right of the presumptive heir of the collateral kindred to that of the next of kin after him.⁸

§ 34. Procedure in Appointing Guardians to Minors. — Except for special purposes, or under peculiar circumstances, the appointment of guardians to minors is now rarely resorted to, in the United States, by courts of chancery.⁹ The procedure, as prevalent in England, is described by Macpherson¹⁰ as based upon a petition usually referred to a

Nettleton v. State, 13 Ind. 159 ; Cockrell v. Cockrell, 36 Ala. 673 ; Cooke v. Beale, 11 Ired. 36, 41. is held in this case that the bond of one so appointed is not, for that reason, void.

⁶ Pease v. Roberts, 16 Ill. App. 634.

¹ De Mazer v. Pybus, 4 Ves. 644, 649.

⁷ Ante, § 14 ; § 23.

² Fernie, in re, 6 Notes Cas. 657, 3 Redf. on Wills, 67 pl. 2.

⁸ Good v. Good, 52 Tex. 1.

³ Rice's Case, 42 Mich. 528.

⁹ Ante, § 18 ; § 25 ; Lake v. McDavitt, 13 Lea, 26, 30.

⁴ Ledwith v. Ledwith, 1 Dem. 154, 157 ; Matter of Cordova, 4 Redf. 66.

¹⁰ Macpherson on Infancy, 106, 107 ; and see remarks of Campbell, J., in Taff v.

⁵ State v. Lewis, 73 N. C. 138. But it Hosmer, 14 Mich. 249, 257.

master to approve of a proper person to be appointed guardian of the person, or of the person and estate; to which end the master is to examine all proper parties, to mention the infant's age, fortune, and relatives, and the grounds upon which any persons are approved as guardians; what maintenance should be allowed, from what period, and out of what fund. The master's report will be confirmed or modified by the Vice-Chancellor, from whose decision appeal lies to the full court.¹ The guardian is to give bond with two sufficient sureties for the faithful administration of the infant's estate; for the guardianship of the person no recognizance is, in modern practice, required.²

The courts invested with the power to appoint guardians in this country³ also proceed upon application by motion or petition, which may be filed in the court by the infant in person, if above the age of fourteen, or by next friend; or by any friend or relative, in his behalf, if he is under fourteen.⁴ The statutes of the several States direct the mode of proceeding, in some instances very minutely, and generally require notice to be given to the next of kin, to the relatives generally, or to the persons having custody of the child, before the court will entertain the application. Where such notice is required by statute, an appointment without it is held void,⁵ or at least gravely irregular,⁶ and will be revoked on the application of a relative not notified if the petition fails to disclose the existence of such relative.⁷ But such notice is held not essential to the validity of the appointment of a guardian, if the statute does not in terms require it.⁸ Neither a father,⁹ nor a mother,¹⁰ is bound by proceedings to appoint a guardian in the Probate Court without notice to him or her; and proof of service of such notice must be made, if the party be within reach of process, by summons; if beyond the jurisdiction

Appointment
by courts
under statutes.

Notice to
relatives.

Parents not
bound by
appointment
without notice
to them.

¹ Schoul. Dom. Rel. § 307.

² Macph. *108.

³ *Ante*, § 25.

⁴ See, *infra*, p. 109, note 6.

⁵ *Seaverns v. Gerke*, 3 Sawy. 353, 364; *Hart v. Gray*, 3 Sum. 339.

⁶ *Matter of Winkleman*, 9 Nev. 303, 306.

⁷ *Matter of Feely*, 4 Redf. 306; *Badenhoof v. Johnson*, 11 Nev. 87, 89.

⁸ *Gibson, Appellant*, 154 Mass. 378, 380.

⁹ *Bowles v. Dixon*, 32 Ark. 92, 96.

¹⁰ *Weldon v. Keen*, 37 N. J. Eq. 251; *Dalton v. State*, 6 Blackf. 357.

of the court, by publication.¹ In New York, it is made the imperative duty of the court, where the application is made, not by the infant in person, but by a relative or other person in his behalf, to assign a day for hearing, and to direct notice thereof to be given to such of the relatives residing in the county as he may deem reasonable for the purpose of protecting the interests of the minor, to which end the surrogate should make the necessary inquiries whether there are any other relatives as near in degree as the applicant, and direct notice to be given accordingly.² Even without the enactment of a statute requiring it, notice to the relatives, if any there be, must be proper.³ So notice to the relatives is necessary, although the statute recognizes no one as entitled to guardianship by preference except the parents, analogously with the practice followed in chancery,⁴ the power to appoint being given to the court to be exercised for the benefit of the infant, not of the applicant.⁵ But the omission to give notice to a father was held in New Hampshire not a sufficient ground to justify appeal from an order appointing a guardian, the statute not requiring such notice.⁶ So the appointment of a guardian to a minor

Notice to the infant not necessary to give jurisdiction.

under fourteen is valid, though no notice be given to any one, either by service or publication, where the statute does not require such notice.⁷ If notice of the proceeding have been given to the parents, the court obtains jurisdiction of the person of the infant without service of notice upon it, other than taking it into custody by the proper officer.⁸ And although it be error to appoint without notice to the mother (the father being dead), yet if afterward a full hearing is had on the merits of the application in presence of all the parties interested, the order will not be reversed, if it appear, on the merits, to be obviously for the benefit of the child that the person appointed should be the guardian.⁹

The power to appoint is usually vested in the court, and should then be exercised only at a regular¹⁰ term there-

¹ *Redman v. Chance*, 32 Md. 42, 52.

² *Underhill v. Dennis*, 9 Pai. 202, 206.

³ *Morehouse v. Cook*, Hopk. 226.

⁴ *Taff v. Hosmer*, 14 Mich. 249, 256.

⁵ *Watson v. Warnock*, 31 Ga. 716, 718.

⁶ *Waldron v. Woodman*, 58 N. H. 15.

⁷ *Gibson, Appellant*, 154 Mass. 378.

⁸ *Board of Guardians v. Shutter*, 139 Ind. 268, 273.

⁹ *Luppie v. Winans*, 37 N. J. Eq. 245, 247.

¹⁰ Where the officers attempt to hold court prior to the time fixed by law, and adjourn from day to day until after that time, judgments of the court rendered subsequent to the rightful convening are valid; and so the appointment of a guardian by the court being a nullity because

of;¹ but the clerk or judge may be authorized to make the appointment in vacation, as in Arkansas,² Missouri,³ &c., in which case the appointment is provisional and must be acted upon by the court at its next term.⁴ But it is held, in Arkansas, that letters granted by the clerk in vacation cannot be collaterally attacked, although no subsequent express confirmation is shown.⁵

Appointment by the court or clerk or judge in vacation.

The application should be by motion or petition in writing, stating the name of the person proposed, and his consent to be appointed;⁶ the appointment without notice to the person appointed, and without his consent, may be set aside by the court having made it.⁷ The omission to file a statement of the ward's estate, as required by statute, has been held, however, not to avoid the appointment;⁸ and the omission to state the names of the wards in the record of appointment, if a defect, is cured by the recital of their names in the bonds, entered immediately after the record of appointment.⁹ The appointment of a guardian to a free person of color, being a matter of record, cannot be proven by parol testimony.¹⁰ But the record of the Orphan's Court is evidence of the appointment of a guardian; the issuing of a certificate of appointment is not material; and any act as guardian, by the person appointed, is an assumption of the trust.¹¹ It has been held that an order appointing a guardian is not void as to the guardianship, because it also appointed the guardian administrator of the estate of the deceased father of the wards, or because it was entitled "in the

Petition for appointment.

not legally in session, the letters issued on such appointment must be regarded as issued by the clerk; and the silent recognition of their validity by the court, after it was legally convened, gives them such validity as cannot be collaterally questioned: *Shumard v. Phillips*, 53 Ark. 37, 42.

¹ In Georgia, where the statute expressly interdicts the grant of letters by the ordinary "except at a regular term of said court" (Code, 1882, § 4112), the appointment of a guardian at chambers was held void, and that all the acts of the person so appointed are nullities: *Bell v. Love*, 72 Ga. 125.

² Dig. of St. 1894, § 3565.

³ Rev. St. 1889, §§ 5279, 5280, 5281, 5282, 5284, &c.

⁴ *Garrison v. Lyle*, 38 Mo. App. 558, 563.

⁵ "The letters so issued must be regarded as legally granted until it is shown that they have been rejected by the court; the silent acquiescence of the court in the action of the clerk in vacation being taken as confirmation of the letters issued by him, as against collateral attack upon the guardian's authority:" *Shumard v. Phillips*, 53 Ark. 37, 42.

⁶ *Rhineland v. Sandford*, 3 Day, 279; *Lewis v. Dutton*, 8 How. Pr. 99, 101.

⁷ *Barns v. Branch*, 3 McCord, 19.

⁸ *Lee v. Ice*, 22 Ind. 384, 386.

⁹ *Ross v. Blair*, Meigs, 525, 545.

¹⁰ *Bryan v. Walton*, 14 Ga. 185, 192.

¹¹ *Eyster's Appeal*, 16 Pa. St. 372, 374.

matter of the estate" of such deceased, or, if the wards be known, because the letters of guardianship were granted "of the heirs," without naming them.¹ Although it may not be neces-

Letters of
guardianship
evidence of
authority.

sary to issue letters of guardianship to authorize a guardian to act,² or certificate of appointment,³ the letter of guardianship may be looked on as an instrument in the nature of a certificate or commission, and is *prima facie* good and admissible to prove the authority of the appointed; although it does not recite the fact of nomination by the minor.⁴ So the appointment may be entered of record *nunc pro tunc* at a subsequent term, if the clerk have omitted to make the entry at the proper time.⁵ But the appointment cannot relate back, so as to validate his prior act in respect to the property and estate of the ward; nor is parol evidence admissible to show an oral appointment and approvement of his bond prior to the date of the appointment as shown by the record.⁶

It was held in Kentucky, that although the record recite that the guardian of a minor had given bond as required by statute, yet if no such bond could be shown to exist, or accounted for, the judge appointing the guardian is liable to the ward for all loss arising in consequence of a failure to take the bond.⁷

Where several infants hold title to property in common, one guardian may be appointed for them jointly, who ought to keep a separate account with each ward, but the validity of whose appointment cannot be questioned collaterally.⁸

§ 35. **Effect of the Appointment.** — The power to appoint guardians to minors is of a judicial nature, and when conferred upon probate courts is in most States subject to appeal, which may be prosecuted by any person who has a right to be heard in the Probate Court.⁹ The subject of appeal from judgments affecting minors will be considered hereafter.¹⁰

Appointment
subject to
appeal.

¹ Reed v. Ring, 93 Cal. 96, 105.

² Norris v. Harris, 15 Cal. 226, 256.

³ Eyster's Appeal, 16 Pa. St. 372, 374.

⁴ The statute not requiring such recital: Burrows v. Bailey, 34 Mich. 64, 66.

⁵ Sprague v. Litherberry, 4 McLean, 442.

⁶ Holden v. Curry, 85 Wis. 504, 510.

⁷ Daniels v. Vertrees, 6 Bush, 4. See,

as to liability of judge for neglecting to take bond, *post*, § 38.

⁸ Pursley v. Hayes, 22 Iowa, 11, 28 *et seq.* As to joint bond for several wards, see *post*, § 38.

⁹ Taff v. Hosmer, 14 Mich. 249, 259; White v. Pomeroy, 7 Barb. 640.

¹⁰ *Post*, § 112.

The appointment of a guardian by a court not having jurisdiction is self-evidently void and impeachable in any collateral proceeding; as where, for instance, the statute requires notice to the next of kin; or citation to the minor, and notice or citation has not been served;¹ or where the minor was not domiciled nor resident in the county, and had no property therein.² But the guardian so appointed will not be heard to deny the legality of his appointment in a proceeding against him to compel him to account for property of the minor in his possession by virtue of such appointment;³ any act as guardian is an acceptance of the trust, and he thereby becomes responsible as such.⁴

Appointment void if court has no jurisdiction;

but guardian cannot deny his liability on such ground.

The appointment of a guardian to a minor made by a court in the due exercise of its jurisdiction cannot be impeached, set aside, or questioned by any other court except in equity for fraud, or by a direct appellate proceeding;⁵ but may be corrected, or annulled by the court having made it, if made under circumstances authorizing a court to revise and correct its own judgments.⁶ Where letters of guardianship are issued and recorded, the guardian gives bond and duly qualifies, and enters on the discharge of his duties with the approval of the probate judge, the acts of the guardian cannot be collaterally attacked, although nothing more appears on the record.⁷ So it has been held that after a great lapse of time (*e. g.* twenty-three years) parol proof will not be heard to show that the minor was, at the time of the guardian's appointment,

Appointment cannot be assailed collaterally.

¹ See *ante*, § 34; *Davis v. Hudson*, 29 Minn. 27, 32; *Gillett v. Needham*, 37 Mich. 143; *Palmer v. Oakley*, 2 Doug. 433, 475 *et seq.*

² *Ante*, § 26.

³ *Hines v. Mullins*, 25 Ga. 696; *Fox v. Minor*, 32 Cal. 111, 119; *Harbin v. Bell*, 54 Ala. 389, 391; *McClure v. Commonwealth*, 80 Pa. St. 167, 169.

⁴ *Nutz v. Renter*, 1 Watts, 229, 235.

⁵ *Succession of Arlaud*, 42 La. An. 320; *Davis v. Hudson*, 29 Minn. 27, 32 *et seq.*; *Walker v. Goldsmith*, 14 Oreg. 125, 132; *Speight v. Knight*, 11 Ala. 461, 465; *Kimball v. Fisk*, 39 N. H. 110, 117; *Mathews v. Wade*, 2 W. Va. 464, 468; *Fridge v. State*, 8 Gill & J. 103, 111; *People v. Wilcox*, 22 Barb. 178, 186; *Shroyer v. Rich-*

mond, 16 Oh. St. 455; *King v. Bell*, 36 Oh. St. 460, 470; *Gronfier v. Puymiro*, 19 Cal. 629, 632; *United States v. Bender*, 5 Cranch, Ct. Ct. 620; *Martin v. Jones*, 12 La. An. 168; *Clinkinbeard v. Clinkinbeard*, 3 Metc. (Ky.) 330, 331; *Lewis v. Dutton*, 8 How. Pr. 99, 103; *Cleveland v. Hopkins*, 2 Aik. 394; *Fitts v. Fitts*, 21 Tex. 511; *Kramer v. Mugele*, 153 Pa. St. 493.

⁶ *Farrar v. Olmstead*, 24 Vt. 123, 127; *Redman v. Chance*, 32 Md. 42, 49 *et seq.*; *Barns v. Branch*, 3 McCord, 19; *Desribes v. Wilmer*, 69 Ala. 25, 31.

⁷ *Howbert v. Heyle*, 47 Kans. 58, 61; *Shumard v. Phillips*, 53 Ark. 37, 42; *Smith v. Porter*, 16 La. An. 370.

not resident of the county in which it was made.¹ And that where a court has jurisdiction over minors as well as over persons of unsound mind, the validity of an appointment cannot be collaterally inquired into, although the record is silent as to the particular ground on which the appointment was made.² It has been held that where the record shows the appointment of a guardian and an order authorizing the sale of land, without showing the facts upon which the jurisdiction of the court of ordinary depended, it will be presumed that the necessary facts existed to give the court jurisdiction.³ The appointment of a guardian for an infant, on petition of its mother and sole surviving parent, by the court of equity of a foreign State in which it was domiciled and its property there situated, cannot be held invalid or irregular when collaterally attacked on the ground that the mother was a married woman and the child, under the age to choose a guardian, was not made a party.⁴ But where children, having a domicil in the State where their property is situated, are by their relatives removed to another State, and guardians are appointed for them there, such appointment is not recognized by the court having jurisdiction of the minor's property. Before any one can sue for property of such minors, he must be appointed by the court having such jurisdiction.⁵

So long as the appointment of a guardian to a minor, by a court in the rightful exercise of its jurisdiction, remains unrevoked, no one else can be appointed or recognized as the lawful guardian of such minor.⁶ The appointment is consummated by the acceptance of the guardian's bond and cannot thereafter be revoked without notice to the guardian.⁷

Guardians appointed by the probate courts of a rebel government having military control of the State were held incompetent to maintain actions as such guardians without renewal of their appointment by the Court of Probate of the rightful State government.⁸

¹ *Sprague v. Litherberry*, 4 McLean, 442, 453 *et seq.*; to similar effect: *Collins v. Powell*, 19 S. W. (Ky.) 578.

² *King v. Bell*, 36 Oh. St. 460, 470; *Shroyer v. Richmond*, 16 Oh. St. 455, 466.

³ *Bush v. Lindsey*, 24 Ga. 245. To similar effect: *Raymond v. Wyman*, 18 Me. 385 (case of a spendthrift).

⁴ *Taylor v. Kilgore*, 33 Ala. 214, 221.

⁵ *Succession of Stephens*, 19 La. An. 499.

⁶ *Dupree v. Perry*, 18 Ala. 34, 37; *Bledsoe v. Britt*, 6 Yerg. 458, 463; *Thomas v. Burrows*, 23 Miss. 550, 556.

⁷ *Isaacs v. Taylor*, 3 Dana, 600, 602.

⁸ *Troy v. Ellerbe*, 48 Ala. 624.

§ 36. **Revocation of Guardianship.**—The power to remove guardians of minors is inherent in chancery courts, extending, in the absence of statutory provisions to the contrary, over all guardians, “whether appointed by themselves, by the Court of Probate, by testament, or even,” says Caton, speaking for the Supreme Court of Illinois, “by express act of the legislature, whenever the guardian abuses his trust, or the interest of the ward requires it.”¹ A bill is not necessary, but the guardian may be proceeded against summarily, being as much under the control of the Court of Chancery, as the guardian in socage;² but, in the discretion of the Chancellor, he may require a bill to be brought.³

Chancery courts may remove guardians.

Summarily, or by bill.

In most, probably all, of the States the power to remove guardians is now vested by statute in the same courts that have power to appoint them.⁴ The power to remove is not an arbitrary one, but to be exercised only for sufficient cause in protection of the ward's interest, which must be proved to exist, or the court will dismiss the petition for removal.⁵ Mere unsuitableness, without misconduct of any kind, is, however, a sufficient cause,⁶ even though it existed before the appointment to the guardianship;⁷ a guardian is “unsuitable” whenever he is incapable, for any reason, to protect his ward.⁸ The court may take into consideration not only the mental condition and moral status of the guardian, but also the rela-

Power to remove vested in probate courts.

Only for sufficient cause.

Mere unsuitableness is sufficient cause.

¹ *Cowls v. Cowls*, 8 Ill. 435, 441.

² *Matter of Andrews*, 1 Johns. Ch. 99; *Ex parte Crumb*, 2 Johns. Ch. 439.

³ *Disbrow v. Henshaw*, 8 Cow. 349, 354.

⁴ *Simpson v. Gonzalez*, 15 Fla. 9. In this case Westcott, J., discusses the effect of a constitutional direction to the General Assembly to “provide by law for the appointment in each county of an officer to take probate of wills, to grant letters testamentary, of administration and guardianship, to attend to the settlement of estates of decedents and of minors, and to discharge the duties usually appertaining to courts of ordinary, subject to the direction and supervision of the courts of chancery, as may be provided by law,” and deduces therefrom the power of the legislature to clothe the judge of probate

with authority to revoke the appointment of a guardian of the person and estate of an infant: p. 39 *et seq.* On pp. 44 and 45 of the opinion there is a list of States in which the power to remove guardians is confided to courts having probate jurisdiction.

⁵ *Whitney v. Whitney*, 7 Sm. & M. 740, 749; *Sanderson v. Sanderson*, 79 N. C. 369; *Sweet v. Sweet*, Speer's Eq. 309; *Copp v. Copp*, 20 N. H. 284, 287; *Morgan v. Anderson*, 5 Blackf. 503; *Slattery v. Smiley*, 25 Md. 389, 394; *Nicholson's Appeal*, 20 Pa. St. 50, 53; *Estate of Rose*, 66 Cal. 240.

⁶ *Gray v. Parke*, 155 Mass. 433; to similar effect: *Windsor v. McAfee*, 2 Metc. (Ky.) 430.

⁷ *Crooker v. Smith*, 66 N. W. (Neb.) 19.

⁸ *Crooker v. Smith*, *supra*.

tive social and pecuniary position of the guardian and the ward, as affecting the interests of the latter in respect of nurture, care, education, and safety.¹ The court may revoke letters of guardianship obtained through false representations,² or in ignorance of the disqualification of the applicant,³ or without proper notice to the parties interested,⁴ or where the guardian is addicted to habitual drunkenness,⁵ or violates his official duties,⁶ such as failing to file inventory or accounts when required,⁷ unless such failure be excused on reasonable ground;⁸ the guardian may be removed for using the ward's money for purposes of speculation, or to pay his personal debts,⁹ instead of investing it;¹⁰ failing to provide comfortable and suitable maintenance and support for his wards out of their estate when ample;¹¹ conviction of felony;¹² insanity;¹³ misconduct arising out of gross ignorance;¹⁴ failure to give the bond required;¹⁵ conversion of the ward's estate without authority from the court, when jeopardizing the interest of the ward;¹⁶ and for conduct tending to alienate the infant ward's affection for her mother, who is a person of good character.¹⁷ So, although difference in the religious faith of the guardian from that of the ward's parents constitutes no reason for the guardian's removal, yet the law will not only justify, but demand the removal of a guardian who attempts, by harsh or unfair means, to erase the impressions made by the parents on the mind of the child, or put its conscience to any kind of torture.¹⁸

May revoke letters improperly granted;

for drunkenness,

violation of official duty,

failure to file inventory,

using ward's money,

failing to provide for ward's maintenance,

for felony, misconduct,

failure to give bond,

converting ward's estate without authority,

alienating ward's affections from mother,

doing violence to ward's religious conviction.

¹ *Damarell v. Walker*, 2 Redf. 198, 205.

² *Clement's Appeal*, 25 N. J. Eq. 508.

³ *Scobey v. Gano*, 35 Oh. St. 550, 553, holding the appointment void.

⁴ *Ramsay v. Ramsay*, 20 Wis. 507.

⁵ *Kettletas v. Gardner*, 1 Paige, 488.

⁶ *Barnes v. Powers*, 12 Ind. 341; *O'Neil's Accounting*, Tuck. 34; *Snavely v. Harkrader*, 29 Gratt. 112, 128.

⁷ *Deegan v. Deegan*, 37 Pac. (Nev.) 360, 361; *Kimmel v. Kimmel*, 48 Ind. 203; *Ripitoe v. Hall*, 1 Stew. 166, 168; *Ledwith v. Union Trust Co.*, 2 Dem. 439.

⁸ *Johnson v. Metzger*, 95 Ind. 307;

Ledwith v. Union Trust Co., 2 Dem. 439, 442.

⁹ *Crooker v. Smith*, 66 N. W. Rep. (Neb.) 19, 21.

¹⁰ *Matter of Cooper*, 2 Paige, 34.

¹¹ *Matter of Swift*, 47 Cal. 629.

¹² *Estate of Soley*, 13 Phila. 402.

¹³ *Modawell v. Holmes*, 40 Ala. 391, 401; *Damarell v. Walker*, 2 Redf. 198, 205.

¹⁴ *Nicholson's Appeal*, 20 Pa. St. 50, 53.

¹⁵ *West v. Forsythe*, 34 Ind. 418.

¹⁶ *Ex parte Crutchfield*, 3 Yerg. 336.

¹⁷ *Perkins v. Finnegan*, 105 Mass. 501.

¹⁸ *Nicholson's Appeal*, 20 Pa. St. 50, 54.

The removal by a guardian from the State constitutes a ground for the revocation of his authority, at least in those States in which non-residence is a disqualification for the original appointment;¹ in some States, however, revocation does not peremptorily follow, but is within the sound discretion of the court, which will not be reviewed by an appellate court.² Going into the Confederate lines and remaining there during the War of the Rebellion constituted no forfeiture of tutorship.³

The guardian is entitled to notice before he can be removed on the ground of any delinquency or misconduct, so that he may have an opportunity to defend against the charge.⁴ An order of removal made on such a ground without notice to the guardian, or appearance by him, is void and collaterally assailable.⁵ Where the statute requires the notice to be in writing, notice by reading the order is held not to be a notice in writing in the sense of such statute, and the removal of a guardian with such notice only, would, it seems, be a nullity.⁶ Even where the removal of the guardian follows upon the exercise of the ward's right to choose another guardian on reaching the age at which the statute authorizes him thereto, it seems better to require notice to be given to the guardian before the confirmation of the ward's choice, because he may show that the person chosen is not a fit person, or he may controvert the ward's age. Hence, the order superseding a guardian in such case, without notice to him, has been held invalid.⁷ But in some States notice to the guardian of proceedings to remove him for non-residence is held unnecessary.⁸ And where confirmation by the court in term is necessary to validate the appointment made by the clerk in vacation, no notice to the guardian so appointed is necessary for his removal and the appointment of another.⁹ Notice to the ward, who is represented by a next friend, is not necessary for the purpose of removing the guardian.¹⁰

Removing
from State.

Guardian must
be notified of
proceeding to
remove him.

Notice must be
as directed by
statute.

Notice on
ward's choos-
ing another
guardian.

¹ *State v. Engelke*, 6 Mo. App. 356, 360; *Cockrell v. Cockrell*, 36 Ala. 673; *Cooke v. Beale*, 11 Ired. L. 36, 38.

² *Nettleton v. State*, 13 Ind. 159; *Speight v. Knight*, 11 Ala. 461, 463.

³ *Clement v. Sigur*, 29 La. An. 798, 799.

⁴ *Gwin v. Vanzant*, 7 Yerg. 143; *Isaacs v. Taylor*, 3 Dana, 600.

⁵ *Colvin v. State*, 127 Ind. 403, 406.

⁶ *Hart v. Gray*, 3 Sumn. 339 (the case turned upon an appointment, but the statute in terms applies equally to removals).

⁷ *Montgomery v. Smith*, 3 Dana, 599.

⁸ *Cooke v. Beale*, 11 Ired. L. 36.

⁹ *Lee v. Ice*, 22 Ind. 384.

¹⁰ *Simpson v. Gonzalez*, 15 Fla. 9, 49.

Application for removal can be made only by a person having an interest. Application for the revocation of letters of guardianship cannot be made by a mere stranger; there should be an averment of interest in the petition, in the absence of which it ought to be dismissed.¹ The court will, *a fortiori*, refuse to remove a guardian who, though originally illegally appointed, has diligently and faithfully protected the ward's interest for ten years, on the application of one who has no direct or personal interest therein.²

Statutory grounds for removal must be alleged. Where the statute enumerates the grounds upon which the court is authorized to revoke letters of guardianship, the existence of one or more of such grounds must be averred against the guardian, otherwise the court cannot entertain the application;³ thus, while a general guardian, whose authority is derived exclusively from judicial appointment, may be deprived of his office by a surrogate, whenever "the infant's welfare will be promoted by the appointment of another guardian," the power to remove a testamentary guardian is limited (in New York) to such as are "guilty of misconduct in the execution of the trust," and "unfit" to be continued in office.⁴ But in many States no difference exists in this respect between general and testamentary guardians.⁵ The specifications on a petition for the removal of a guardian as an unsuitable person are intended merely to guard the respondent against surprise, and not to narrow the issue; they may be amended by the court, and the court may, in its discretion, hear evidence bearing on the issue, though not covered by the specifications.⁶ Where the statute authorizes the court to make, of its own motion, an order removing the guardian of a minor for cause, such an order, made on petition of some person interested, is not invalid because of the petition's being defective.⁷

Powers of guardian removed cease, although he appeal. The powers of a guardian who has been removed by the Probate Court as an unsuitable person, and in whose place another guardian has been appointed, immediately cease, notwithstanding appeal from the decree removing him.⁸

¹ Cotton v. Goodson, 1 How. (Miss.) 295.

² Dull's Appeal, 108 Pa. St. 604, 606.

³ Ledwith v. Union Trust Co., 2 Dem. 439; Kahn v. Israelson, 62 Tex. 221, 224.

⁴ Mackay v. Fullerton, 4 Dem. 153.

⁵ McPhillips v. McPhillips, 9 R. I. 536.

⁶ Gray v. Parke, 155 Mass. 433.

⁷ Cherry v. Wallis, 65 Tex. 442. See Isaacs v. Taylor, 3 Dana, 600.

⁸ State v. McKown, 21 Vt. 503.

Guardians of minors were not, in England, allowed to resign their office;¹ but in the United States it is commonly provided by statute, that for cause shown the court may, in its discretion, accept a guardian's resignation; and in the absence of a statute authorizing the court to accept the resignation, the resignation of a guardian has been held sufficient cause to authorize the court to remove him, under its authority to remove for cause.² The statutory requirement, that a guardian must settle his accounts before his resignation can be accepted, has no application where the record shows that no estate ever came to the hands of the resigning guardian.³

Guardians
may resign for
cause shown.

¹ Macph. on Inf. 26, as to guardians in socage; p. 128, as to testamentary guardians. See *Young v. Lorain*, 11 Ill. 624, 633.

² *Young v. Lorain*, 11 Ill. 624, 633;

Brown v. Huntsman, 32 Minn. 466, on the authority of *Rumrill v. First National Bank*, 28 Minn. 202.

³ *McGale v. McGale*, 29 Atl. 967.

CHAPTER V.

OF THE GUARDIANSHIP BOND.

§ 37. Bonds required from Guardians by Chancery Courts. — Formerly, Macpherson states,¹ the appointment of a guardian, to an infant having title to real estate, by the Court of Chancery, was deemed sufficient without the appointment of a receiver; and if a separate receiver became necessary, an order for one was made on petition. But it was held, later, that no receiver could be appointed to take charge of an infant's property except on bill filed.² If a suit was pending, it was usual to appoint a receiver for the management of the infant's property,³ who was required to enter into recognizance with sureties to the Master of the Rolls and the Senior Master in Chancery.⁴ And guardians of the person and estate of an infant, appointed in chancery, if no suit is pending, are required to enter into recognizance with two sufficient sureties, conditioned to account for such part of the infant's capital as shall come to their hands.⁵ The recognizance extends to the whole of the personal property of the infant, and two years' income from the real estate, if any. Sometimes the personal recognizance of the guardian is deemed sufficient without sureties; but it is more usual to require two sureties. But no recognizance is demanded, according to the modern practice, from guardians of the person only.⁶

So, in the United States, the guardian of the estate of a minor, appointed by a chancery court, is always required to give ade-

¹ Macpherson on Inf. 105 *et seq.*

² *Ex parte Whitfield*, 2 Atk. 315.

³ Macph. 105 *et seq.*

⁴ Macph. 266, note *k*.

⁵ The condition against the ward's marriage without consent of court was sometimes moderated so as to make the

marriage without consent of court a breach only if it was with the connivance of the guardian: *Doctor Davis's Case*, 1 P. Wms. 698; *Eyre v. Shaftsbury*, 2 P. Wms. 103, 112.

⁶ Macph. 108; *Doctor Davis's Case supra*.

quate security, to be approved by the master; but the guardian of the person gives none.¹ The expense of giving the bonds is payable out of the infant's estate, though exceeding the amount of taxable costs limited by statute.² The amount of the security required is usually fixed at double the amount of the value of the personal estate and income from real estate; but the court will exercise a sound discretion in relation thereto, and may, if the giving of a bond in the required amount would prove a hardship, allow the security to be given in a fair sum only.³

American
practice in
chancery.

Where a court of chancery obtains jurisdiction over the proceeds of sale of a minor's real estate, the Chancellor may, before permitting them to go into the hands of a guardian, who has not given a guardianship bond, require him to give sufficient bond for the protection of his ward; and the failure to require bond did not affect the jurisdiction, nor constitute any obstacle to an approval of the sale.⁴ So the court will *ex officio* require a tutor to give additional security before the purchase-money in the hands of an administrator, resulting from a sale of real estate in which minors have an interest, is paid to such tutor.⁵

§ 38. **Guardianship Bonds in Probate Courts.** — But, as heretofore remarked,⁶ guardians are now rarely appointed, in this country, in other than probate courts, or courts having probate or testamentary jurisdiction.⁷ These courts are required by statute to see that no guardian be appointed without giving bond, — stringent provisions being enacted and rigidly enforced, in some instances, to insure compliance with this requirement of the statutes. Thus, where a statute requires "good surety, approved by the court," making the judges liable to the ward for any damage "if the court fails to take such covenant, or accepts such person or persons for surety as do not satisfy it of their sufficiency," it is held that the judges must have personal knowledge of the sufficiency of the surety offered, or institute inquiry on the subject, and are liable in damages for omitting such in-

Probate courts
required to ex-
act bond from
guardians.

Liability of
courts failing
to take suffi-
cient bond.

¹ 2 Kent, *227.

² Matter of Morrell, 4 Pai. 44, 45.

³ Matter of Hedges, 1 Edw. Ch. 57.

⁴ Owens v. Cowan, 7 B. Mon. 152, 155.

⁵ Succession of Lange, 46 La. An. 1017, 1020.

⁶ Ante, § 18.

⁷ Except, of course, guardians *ad litem* and next friends, who are appointed by the court before which suits affecting the rights of infants may be pending: ante, § 21.

quiry.¹ And where the record recited that a bond was given with two sureties (named), it was held that the circumstance that no such bond could be found was sufficient proof *aliunde* that no bond was taken, and the judge held liable.² Where a bond defectively executed is accepted by the court, the judge (and not the clerk) is liable to the person injured;³ but if it was the duty of the clerk to see that the bond is given, he will be held liable for the negligence in omitting to take such bond.⁴ The liability extends only to those who made the appointment, not to such as were not present when the appointment was made, though they signed the minutes.⁵

The giving of the bond is generally held to be a prerequisite to the validity of the appointment, unless the statute appoint- invalid if bond is not given. authorizes the appointment without bond,⁶ and unless such is the case, no act of a guardian not having given bond is valid;⁷ but in some States the execution of the Rule otherwise in some States. bond is not a condition precedent to the execution of the trust of guardian;⁸ and although the giving of the bond be necessary before the guardian can act, yet it is not proper to sustain a demurrer on the ground that his petition does not show the giving of the bond;⁹ and where the Probate Court is required by law to take bond from a guardian before issuing letters of guardianship, and the letters recite the giving of the bond, and the court has entertained an application of the guardian

¹ Colter v. McIntire, 11 Bush, 565; Commonwealth v. Netherland, 87 Ky. 195, 198; Austin v. Richardson, 1 Gratt. 310, 322.

² Daniels v. Vertrees, 6 Bush, 4.

³ Kinnison v. Carpenter, 9 Bush, 599, 604. Pryor, J., delivering the opinion in this case, expressed some doubt as to the liability of the judge, concurring with the majority, however, in deciding that the judge was not liable, because the statute of limitation commenced to run from the date of the approval of the void bond, and had run its course before action brought. See also Davis v. Lanier, 2 Jones, L. 307, 309; Page v. Taylor, 2 Munf. 492, 498.

⁴ Howerton v. Sexton, 104 N. C. 75, 85.

⁵ Strong v. Harris, 3 Humph. 451, 455.

⁶ As is the case, in some States, with testamentary guardians. See post, § 39.

⁷ Poe v. Schley, 16 Ga. 364; Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580, 589; Westbrook v. Comstock, Walk. (Mich.) Ch. 314; State v. Sloane, 20 Ohio, 327, 330; Wadsworth v. Connell, 104 Ill. 369, 375; Murphy v. Superior Court, 84 Cal. 592, 597; Clarke v. State, 8 Gill & J. 111, 124; Fay v. Hurd, 8 Pick. 528, 531; Hatch v. Ferguson, 68 Fed. 43, 46.

⁸ Russell v. Coffin, 8 Pick. 143, 149 (a guardianship over a spendthrift); Palmer v. Oakley, 2 Doug. 433, 459; Howerton v. Sexton, 104 N. C. 75, 85. So in Georgia, it is held that although the law requires bond and security, yet the grant of letters of guardianship without bond, though erroneous, would not make the letters void as against a *bona fide* purchaser: Cuyler v. Wayne, 64 Ga. 78, 87.

⁹ Temple v. Price, 24 Mo. 288.

to sell the ward's real estate, it will be presumed that the bond was given, though it cannot be found in the court files.¹ So it is held that where the record shows the giving of the bond with sureties, and no sureties signed the bond, this was sufficient "committing of an orphan's estate to the charge of guardianship" to make the judge liable for damages for not taking a sufficient bond.²

A minimum amount is in most States fixed by statute for the penalty of the guardianship bond, usually double the value of the personal estate and of the income of the realty during the minority of the infant, and the judge appointing a guardian should ascertain this by the examination of witnesses, and direct the giving of a bond accordingly, requiring the sureties to justify in at least the amount of such penalty.³ If by mistake of the officer taking the bond the penalty is fixed at a higher sum than the law requires, the mistake cannot be corrected by the courts.⁴ So it is held in New York that a petition, showing that all the funds that had come to the hands of the guardian had been paid out except a small sum, and all the ward's lands sold, and the proceeds deposited in the county treasury to be paid to the ward on his attaining majority, and praying that his original bond be cancelled on giving a new bond in a smaller penalty, must be denied, although the guardian was obliged to pay his surety (a surety company) its charge for the original bond; the reason given being, that the statute provides for an increase, but not for a reduction of a guardian's bond.⁵

In several of the States it is now provided by statute that one single bond may be given for several wards who are entitled to portions of the same estate, or where the same person is at the same time appointed guardian for more than one ward.⁶ But a statute directing that the court appointing a guardian "shall take bond of him, with good sureties, and in a sufficient sum, for

¹ *McGale v. McGale*, 29 Atl. (R. I.) 967.

² *Davis v. Lanier*, 2 Jones, L. 307.

³ *Bennett v. Byrne*, 2 Barb. Ch. 216, 219.

⁴ Particularly not where the obligors permitted the guardian to receive large sums of money on the faith of the validity and adequacy of the bond: *Peelle v. State*, 118 Ind. 512, 516.

⁵ *In re Patterson*, 15 N. Y. Supp. 963.

⁶ *Walsh v. State*, 53 Md. 539, deciding that one action may be brought for the use of several wards; *Winslow v. People*, 117 Ill. 152, 156, holding that the sureties in such a bond are not relieved from liability for the guardian's acts in reference to surviving wards after the death of one. To same effect: *Roberson v. Toun*, 76 Tex. 535, 538.

Separate bond required for each minor, the faithful execution of his office," is construed as requiring a separate bond with respect to the estate of each minor;¹ and while the act of tendering one bond in a joint form pertaining to the estates of several infants may not comply with the statutory injunction, and its acceptance by the court deserve censure, yet the sureties on such bonds are not for that reason absolved from their liability to the minors.² And so, if one guardian has been appointed jointly for several infants who hold property in common, there is no legal objection to the approval of a joint bond.³ But in a suit on a bond for three wards, which was brought for the interest of only two of them, the judgment should not be for more than two-thirds of the penalty.⁴

but joint bond for several minors is valid,

and there is no legal objection to such.

It is held in Alabama that, under a statute providing that the singular may include the plural, a bond required to be given in "twice the supposed value of the estate of the ward" is valid as a statutory bond if given for the benefit of more than one minor.⁵

Judgment on a joint bond cannot exceed the obligee's proportional share. In a suit on a joint bond for the protection of several minors, judgment cannot be given for a greater sum than the proportional amount of the penalty in favor of the party bringing the action, unless the other infants

are also made parties, so that it may appear that their interests are not jeopardized by the judgment.⁶ In a Mississippi case, it is held that in such case the court has no jurisdiction to render a judgment affecting the interests of the co-usees of the ward suing; and that, if it had jurisdiction, it was error to direct the recovery in favor of all, and that the shares belonging to the co-usees be paid over to the guardian in default.⁷ And where a guardian is appointed for three minors, giving bond for only two, and acts as

Minor omitted in a joint bond can have no judgment on it, guardian for all three, and as such makes settlements showing indebtedness to all three, it is erroneous to give judgment against the sureties in a suit on the

¹ Ordinary v. Heishon, 42 N. J. L. 15, 17; Court of Probate v. Sprague, 3 R. I. 205, 211.

² Ordinary v. Heishon, *supra*; Court of Probate v. Sprague, 3 R. I. 205, 211; Turner v. Alexander, 41 Ark. 254, 257.

³ Pursley v. Hayes, 22 Iowa, 11, 29 *et seq.* See also Brown v. Roberts, 14 La. An. 259, holding a joint bond for several wards good.

⁴ Knox v. Kearns, 73 Iowa, 286, 288.

⁵ Brunson v. Brooks, 68 Ala. 248, 251.

⁶ Hook v. Evans, 68 Iowa, 52; Edmonds v. Edmonds, 73 Iowa, 427; Call v. Ruffin, 1 Call. 333, 335.

⁷ "The decree, if carried into effect," says Cooper, J., "would finally dissipate the estate of the infants:" Loyd v. Doll, 11 So. Rep. (Miss.) 608.

bond in favor of the ward whose name was omitted from the bond.¹ Nor can a court, after appointing a guardian for several minors, and taking bond from him, at a subsequent term appoint him guardian for another minor without taking bond, directing that his original bond shall stand also for the minor last appointed.²

although court
ordered the
bond to stand
for such minor.

Whenever it appears that any of the sureties on a guardian's bond have become insolvent, or have died, or removed from the State; or that the penalty in the bond is insufficient, or that from any cause the bond has become or is inadequate, it is the duty of the Probate Court, independent of any statutory provision, to require the guardian to give other or further security by filing a new or additional bond, and to remove the guardian if he fail to comply with an order so made.³ And a bond given voluntarily, in addition to one that was too small in amount of the penalty, is as binding as though given in compliance with an order of the court.⁴ So a chancery court will refuse to order money belonging to the wards of a guardian, who has given bond, but one of whose sureties had become insolvent, to be paid to him until other and further security be given.⁵

New and addi-
tional bonds.

Where a bond with sureties has been given by the guardian in obedience to the requirement of the court appointing him, it has no power to direct the bond to be given up, or cancelled, while the guardianship continues, and its duties remain unperformed,⁶ unless such power be conferred by statute. But the death of the surety, though the only one, does not terminate the guardian's authority; the court should in such case require a new bond to be given, for refusing which the guardian may be removed. If such order is not made, the authority of the guardian continues unabated.⁷

Although the statute demand "a bond, with sufficient freehold sureties" (using the noun in the plural number), it, upon a rea-

¹ *Greenly v. Daniels*, 6 Bush, 41.

² *Vanderburg v. Williamson*, 52 Miss. 233.

³ *State v. Hull*, 53 Miss. 626, 643; *Ward v. State*, 40 Miss. 108, 113; *Succession of Lange*, 46 La. An. 1017, 1020.

⁴ *Potter v. State*, 23 Ind. 550; to similar effect, *Elam v. Barr*, 14 La. An. 671.

⁵ *Genet v. Tallmadge*, 1 Johns. Ch. 561, 564.

⁶ *Newcomer's Appeal*, 43 Pa. St. 43, holding that for that reason the court may properly direct the word "cancelled" to be stricken off, if improperly so marked on the bond.

⁷ *Prine v. Mapp*, 80 Ga. 137, 144.

sonable interpretation, does not require more than one freehold surety.¹

§ 39. **Bonds of Testamentary Guardians.**—It appears from an earlier section² that in some of the States the authority of

States in which testamentary guardians give no bond. testamentary guardians flows directly from the will or deed appointing them, without further action of the Probate Court, from which it follows that in

these States testamentary guardians are not required to give bond.³ In others the authority of a testamentary guardian is

May for cause be ordered to give bond. recognized to be the same as that of the father making the appointment,—that is to say, he is not required to give bond unless waste is committed or

apprehended, or property comes to the ward from some other source beside the father;⁴ or testamentary guardians are by statute relieved from the requirement to give bond, unless, from a change of circumstances after the making of the will, it is deemed imprudent to dispense therewith;⁵ or they may be relieved by the testator, unless the judge, for sufficient cause, shall

In others, required to give bond like other guardians. require bond.⁶ In some of the States it is provided by statute that testamentary guardians, when appointed, have the same powers, and are subject to the same regulations and statutory provisions, and must give bond in like manner as other guardians.⁷

Although a testamentary guardian may be primarily excused from giving bond for the faithful discharge of his duty, yet courts

Required to give bond if necessary to protect ward. will require them, whenever such circumstances are shown as justify their interposition in favor of minors, to enter security adequate for the protection of a ward.⁸ If necessary, a court of chancery will compel a testa-

¹ *Arrowsmith v. Gleason*, 129 U. S. 86, 1887, § 2601; West Virginia: Code, 1891, ch. 82, § 5.

² *Ante*, § 20.

³ *Ante*, § 20.

⁴ So provided by statute in Georgia: Code, 1882, § 1804; *Poe v. Schley*, 16 Ga. 364; Nevada: Gen. St. 1885, § 558.

⁵ As in Kentucky: Gen. St. 1894, § 2020.

⁶ As in Michigan: Gen. St. 1890, § 6312; Ohio: Rev. St. 1880, § 6268; Oregon: Code, 1887, § 2886; Texas: Rev. Civ. 1888, § 2522; Vermont: Rev. L. 1894, § 2748; Virginia: Code,

⁷ So, for instance, in Idaho: Rev. St. 1887, § 5782; Illinois: St. & Curt. St. 1885, ch. 64; Indiana: St. 1894, § 2683; New York: Throop's Ann. St. 1887, § 2851.

⁸ Where a testamentary guardian, though fully solvent, neglects to inform the court of the manner in which he has invested the funds of his ward, it is fair to infer that he has used them in his business, and he should be ordered to enter security for the better protection of the estate: *Estate of Stanton*, 13 Phila. 213.

mentary guardian to give security, so as to prevent injury to the ward's estate.¹

The office of testamentary guardian, where two have been appointed, is held to be joint and several, so that both, or either without the other, may qualify, and without summoning the other accept or renounce the guardianship.²

One of two testamentary guardians may qualify.

§ 40. *Requisites of a Sufficient Guardian's Bond.* — The bonds given by guardians of minors in probate courts are sometimes in very inartificial form; but it is the policy of courts to hold them good if signed by the principal and the sureties, delivered by them to the court or its officers, and expressing the intention or purpose to guarantee the faithful discharge of the guardian's duty to the ward. The purpose of the bond is to insure, so far as human foresight may, the proper education of the ward according to his means and the standing of his family, humane treatment, and the faithful and wise management of his estate. If this purpose be substantially expressed in the bond, it will be held good, though deviating from the language of the statute.³ For money received in good faith by a guardian appointed by a court not having special jurisdiction, because the ward did not reside in the county, he and his sureties are liable, being estopped from denying the validity of the bond.⁴

Bond is sufficient if it substantially express the objects to be secured by it.

Guardian's bonds have been held valid and enforceable, although no penalty is named therein;⁵ nor is a guardian's statutory bond converted into a common law bond by the mere introduction of provisions not required by the statutory form, if these provisions do not work a change of the statutory powers or duties

Bonds not invalid, though naming no penalty, or containing surplusage,

¹ *Thomas v. Williams*, 9 Fla. 289, 298; *Matter of Andrews*, 1 Johns. Ch. 99.

² *Kevan v. Waller*, 11 Leigh, 414, 427.

³ *Probate Court v. Strong*, 27 Vt. 202, 205; *Stevenson v. State*, 71 Ind. 52, 56; *Fee v. State*, 74 Ind. 66, 68.

⁴ *McClure v. Commonwealth*, 80 Pa. St. 167, 169; and see *infra*, p. 126.

⁵ *Britton v. State*, 115 Ind. 55, following, *State v. Britton*, 102 Ind. 214 (under a statute providing that a "guardian's bond shall not be void on account of any informality, illegality, or defect, either

formal or substantial, in the same, nor on account of any informality, illegality, or defect in the appointment of such guardian; but shall have the same force and effect as if such appointment had been legally made, and such bond legally executed"); *Dodge v. St. John*, 96 N. Y. 260, 264, holding the only effect of the omission to be to make the liability commensurate with the condition. It has been held that if void at law such bond may be good in equity: *Bumpas v. Dotson*, 7 Humph. 310, 318.

or covenants not obligatory, of the guardian.¹ So it is held that a guardian's bond is not avoided by the introduction of covenants that are not obligatory, nor by the omission of covenants required by the statute, but binds the obligors to the extent of the legal condition.² The insertion of the names of the wards in the wrong place does not vitiate the instrument as a statutory bond, if their true names can be gathered from the context;³ and so of a bond in which a wrong name is inserted for that of the ward;⁴ or where the name of the surety is written in a wrong place;⁵ or where the names of the payees are inserted in a form different from that prescribed by the statute,⁶ or where a blank was left for the initials of the ward's name.⁷ But, as already stated,⁸ where a bond is given for several wards, the court cannot, by an order at a subsequent term, direct such bond to stand also for another ward over whom the guardian was appointed after giving the bond.

Even a voluntary bond, if not in contravention of public policy or statutory law, is binding on the makers; hence, a bond given for the performance of a trust reposed, whether public or private, is valid, and though inoperative as a statutory guardian's bond, will be good as a common law bond.⁹ Bonds, though void at law, may be cured in

¹ *McFadden v. Hewett*, 78 Me. 24, 28.

² *Pratt v. Wright*, 13 Gratt. 175 (placing guardians' bonds in the same category with the bonds of public officers, and relying on *United States v. Bradley*, 10 Pet. 343; *Central Bank v. Kendrick*, Dudley (Ga.), 66; *Speck v. Commonwealth*, 3 Watts & S. 324; *Commonwealth v. Pearce*, 7 Monr. 317; *Walker v. Chapman*, 22 Ala. 116, all of which hold that bonds or other deeds are void as to the conditions, covenants, or grants that are illegal, but are good as to all others which are legal, unless the statute prescribe a form and expressly or by necessary implication avoids the whole of an instrument in which this form is departed from); *Call v. Ruffin*, 1 Call, 333; *State v. Williams*, 77 Mo. 463, 469.

³ *State v. Martin*, 69 N. C. 175.

⁴ *State v. Perkins*, 1 Jones, L. 325; *Landon v. Comet*, 62 Mich. 80; or if inoperative at law may be binding in equity: see *infra*, note 1, p. 127.

⁵ *Richardson v. Boynton*, 12 Allen, 138, deciding that parol evidence may be received to show that the signature was intended as that of a surety.

⁶ *Justices v. Buchanan*, 2 Murphy, 40. Judgment in this case was rendered in favor of the obligors on the ground that plaintiffs sued in neither their natural nor corporate capacity; the discrepancy between the words "the Justice or Justices present in court, the survivor or survivors of them, their executors," etc., as prescribed by statute, and "the Justices of the County Court of Caswell, and their successors," as inserted in the bond, was held not fatal.

⁷ *Turner v. Alexander*, 41 Ark. 254, 256.

⁸ *Ante*, § 38, p. 123.

⁹ *State v. Williams*, 77 Mo. 463, 469; *Gathwright v. Callaway*, 10 Mo. 663, 666; *United States v. Bradley*, 10 Pet. 343; *Alston v. Alston*, 34 Ala. 15, 23; *Ordinary v. Heishon*, 42 N. J. L. 15, 18; *State v.*

equity so as to bind both principal and sureties;¹ and although as a general rule the estate of a deceased obligor in a joint bond cannot be reached at law or in equity, yet where it is made to appear that a bond does not express the intention with which it was given, as in the case of a guardian's bond, which the law requires to be adequate security for the ward's estate, and a joint bond is shown to be inadequate security, equity will reform the instrument against sureties as well as against principals, and it will be presumed that such a bond was meant to be joint and several.² And it has been held that the guardian's bond is valid, though not executed by the guardian.³ A guardian's bond is binding on the sureties, though it may not have been approved by the court.⁴ Erasures on the face of a bond will be presumed, *prima facie*, to have been made before delivery and approval, and a bond containing material erasures is admissible in evidence, subject to rebuttal.⁵

Bonds good in equity.

Binding though not approved by court.

Erasures presumed to have been made before delivery.

But a bond good only as a common law bond, because not made in accordance with the statutory requirements, is nevertheless void if so drawn as to make it necessary for the action to be brought by or in the name of one of the obligors.⁶

Delivery has been held complete, where a bond, calling in its premises for three sureties, was executed by two of them and left with the surrogate, they intending to deliver it as an escrow and using words expressing such purpose, the guardian promising to bring in the third surety; and the two sureties, having signed, were held liable.⁷

Delivery may be complete, though intended to be as escrow.

Martin, 69 N. C. 175, 179; Cotton v. Wolf, 14 Bush, 238.

¹ Wiser v. Blachly, 1 Johns. Ch. 607; Sikes v. Truitt, 4 Jones, Eq. 361, 363; Armistead v. Bozman, 1 Ired. Eq. 117, 122; Bumpas v. Dotson, 7 Humph. 310; Butler v. Durham, 3 Ired. Eq. 589, 591.

² So that an obligee in such a joint bond was allowed to recover against the estate of a deceased surety, after obtaining a dividend thereon from the estate of the deceased guardian: Olmsted v. Olmsted, 38 Conn. 309, 317 *et seq.*

³ The bond of a married woman, incompetent to execute a bond at law, is

good, if the sureties are sufficient: Palmer v. Oakley, 2 Doug. (Mich.) 433, 456.

⁴ State v. Richardson, 29 Mo. App. 595, 602; State v. Britton, 102 Ind. 214. To similar effect: Clement v. Hughes, 17 S. W. (Ky.) 285.

⁵ Xander v. Commonwealth, 102 Pa. St. 434, 438.

⁶ Justices v. Dozier, 3 Dev. L. 287; following Justices v. Armstrong, 3 Dev. L. 284; Davis v. Somerville, 4 Dev. L. 382.

⁷ Ordinary v. Thatcher, 41 N. J. L. 403, 409; State v. Potter, 63 Mo. 212, 216; Brown v. Probate Judge, 42 Mich. 501. Similar in effect: Arrowsmith v. Gleason, 129 U. S. 86, 96.

Good, though delivered before appointment.

bonds will

Principals and sureties estopped from denying validity of bond,

but may be released in direct proceeding.

Guardian may make himself and his surety liable as trustee.

Sureties estopped from denying validity;

but contrary also held.

Delivery of the bond is sufficient, though made before the day on which the guardian is appointed.¹ And

in general, neither principals nor sureties on such

be allowed to deny their legal effect after delivery, on

the ground that the principal promised to procure

additional sureties, or furnish an indemnity bond,² or

that the name of a co-surety has been erased without

his knowledge,³ or that it was a forgery, if the breach

of the condition under which the signature had been obtained, was

unknown to the officer taking the bond.⁴ But this

principle must not be understood as militating against

the right of the surety to demand his release from the

bond under such circumstances, in a direct proceeding for that

purpose;⁵ and in defence of a suit on the bond the surety may

avail himself of a judgment that the principal is not a guardian,

although rendered in a proceeding to which he was

not a party.⁶ A guardian appointed by a court not

having jurisdiction, or assuming to act without ap-

pointment, makes himself liable as a trustee *in in-*

vitum; and on final settlement of such a guardian's account

in equity, the sureties on his official bond cannot escape respon-

sibility on account of the invalidity of the guardian's appoint-

ment.⁷ The authorities greatly preponderate that

sureties on guardian's bonds are estopped from deny-

ing, in actions on such bonds, the truth of the recitals,

or the validity of the appointment;⁸ but it has also been held

that neither reason nor authority exists to estop a

party from showing that the instrument containing

the recitals is itself a nullity, and that a bond accepted by a

court having no power to accept it is void and fixes no liability

upon the sureties.⁹

¹ Vincent v. Starks, 45 Wis. 458, 463.

² State v. Hewitt, 72 Mo. 603, on the authority of State v. Modrel, 69 Mo. 152; Hunt v. State, 53 Ind. 321, 323; State v. Lewis, 73 N. C. 138.

³ Xander v. Commonwealth, 102 Pa. St. 434, 439.

⁴ State v. Hewitt, *supra*, on the authority of State v. Baker, 64 Mo. 167, and Missouri cases, *supra*.

⁵ Bradley v. Trousdale, 15 La. An. 206.

⁶ Crum v. Wilson, 61 Miss. 233, 236.

⁷ Corbitt v. Carroll, 50 Ala. 315, 318; Iredell v. Barbee, 9 Ired. 250, 254 (guardianship of an imbecile); Cotton v. Wolf, 14 Bush, 238, 247.

⁸ Gray v. State, 78 Ind. 68, 72; Shroyer v. Richmond, 16 Oh. St. 455, 467; Fridge v. State, 3 Gill & J. 103, 114; Norton v. Miller, 25 Ark. 108, 110; State v. Mills, 82 Ind. 126; Dodge v. St. John, 96 N. Y. 260; Estate of Doner, 156 Pa. St. 301.

⁹ Thomas v. Burrus, 23 Miss. 550, 558 (relying, *i. a.*, on Griffith v. Frazier, 8

§ 41. **Extent of Liability of Sureties on Guardians' Bonds.** — It may be stated as a general proposition of law, that the guardian of a minor is liable on his bond for all property belonging to the ward, that comes into his possession, and for all such property that is lost to the ward by reason of the guardian's carelessness, bad faith, or gross ignorance. And since the bond is required for the purpose of securing to the ward all that he may be entitled to, it is obvious that the liability of the sureties is co-extensive with that of the guardian, limited by the penalty of the bond, and the amount which the latter may pay in the discharge of his obligation.¹ The guardian and his sureties are, accordingly, liable in a suit on the guardianship bond, for any indebtedness due by the guardian to the ward before the appointment as guardian;² for the rent of real estate of the ward occupied by the guardian,³ and the proceeds of sale of real estate paid to the guardian before his appointment as such,⁴ or in his capacity as special commissioner,⁵ or coming to his hands from a sale of real estate on the application of some person other than the guardian;⁶ and for amounts paid the guardian by an administrator, and ordered to be refunded.⁷ So, also, the sureties are liable for any misapplication of property that comes into the guardian's hand from another State;⁸ and for money held by the guardian, in his capacity as executor of an estate in which the ward is interested, and which he has transferred to himself as guardian, although the court did not make an order for a new bond as required in such case by statute.⁹ So if he sell the ward's property to a

Liability of sureties is co-extensive with that of the principal, within the penalty of the bond,

for all property that came, or with due diligence ought to have come, into the guardian's hand,

Cranch, 9; *Vick v. Vicksburg*, 1 How. (Miss.) 379; *Bledsoe v. Britt*, 6 Yerg. 458; *Lewis v. Brooks*, 6 Yerg. 167, neither of which turned upon the question of estoppel, nor involved the validity of a bond); *Crum v. Wilson*, 61 Miss. 233.

¹ *Hunt v. State*, 53 Ind. 321, 325.

² *Mattoon v. Cowing*, 13 Gray, 387, 390; *Neill v. Neill*, 31 Miss. 36, 40; *Sargent v. Wallis*, 67 Tex. 483, 486; *Clement v. Hughes*, 17 S. W. (Ky.) 285; *Johnson v. Hicks*, 30 S. W. (Ky.) 3.

³ *Mattoon v. Cowing*, *supra*.

⁴ *McClendon v. Harlan*, 2 Heisk. 337; *Warwick v. State*, 5 Ind. 350.

⁵ *Taylor v. Hemingway*, 81 Ky. 158.

⁶ *Colburn v. State*, 47 Ind. 310, 314.

⁷ *Wilson v. Soper*, 13 B. Mon. 411, 419.

⁸ *McDonald v. Meadows*, 1 Metc. (Ky.) 507; *Brooks v. Tobin*, 135 Mass. 69; *State v. Williams*, 77 Mo. 463, 469; *State v. Hull*, 53 Miss. 626, 648; *Pearson v. Dailey*, 7 Lea, 674.

⁹ *In re Sandison's Estate*, 25 N. Y. Supp. 694. To same effect: *Huson v. Green*, 88 Ga. 722; *Estate of McIntosh*, 158 Pa. St. 525.

non-resident without authority, and takes the purchaser's notes to himself as guardian, his sureties are liable for the amount of such notes with interest, in case the guardian fails to account.¹ The liability of the sureties of the guardian continues after the guardian, succeeding himself as trustee of his former ward, takes a receipt made by himself as trustee to himself as guardian, although he was at the time insolvent, if he had previously mingled the ward's estate with his own.² The sureties are liable not only for what the guardian has received, but for what he might have received by the exercise of ordinary diligence and the highest degree of good faith.³ It would seem, however, that for property beyond the guardian's reach without a foreign appointment, the sureties are not liable, at least not beyond a general dereliction of duty in obtaining it.⁴ And so for contracts of the guardian personally,⁵ and for property received by the guardian unlawfully, although he is undoubtedly liable therefor himself, his sureties have, in some cases, been held not liable, because it does not come to him as guardian;⁶ but in others it is held that the guardian can exonerate neither himself nor his sureties by showing that the money which he received by virtue of his guardian's office was due to another.⁷ And where the same person is administrator of an estate and guardian of the son of the intestate's widow, and the widow assigns her share in the estate to the ward, it will be presumed that said share has been paid by the administrator and is in the hands of the guar-

¹ *Lyne v. Perrin*, 31 S. W. (Ky.) 869.

² *State v. Branch*, 126 Mo. 448.

³ *State v. Brown*, 73 N. C. 81; *McWilliams v. Norfleet*, 63 Miss. 183; *Harris v. Harrison*, 78 N. C. 202, 212.

⁴ *Schoul. Dom. Rel.* § 367.

⁵ *McKinnon v. McKinnon*, 81 N. C. 201.

⁶ *Allen v. Crosland*, 2 Rich. Eq. 68, 74 (holding that the sureties on a guardian's bond were not liable for the corpus of a legacy to an infant, payable when twenty-one years of age, which was paid to the guardian before the legatee reached that age; but that they were liable for the interest on the legacy, because such interest was properly payable to the guardian); to same effect: *Hindman v. State*, 61 Md. 471, 475; *Hinckley v. Judge*, 45 Mich.

343; *State v. Radcliff*, 99 Mo. 609, 615; *Livermore v. Bemis*, 2 Allen, 394 (holding that the administrator of a deceased guardian and executor cannot exonerate the sureties of the executor, and render liable those of the guardian, by transferring to the guardian's account a legacy before the same is payable to the legatee); *Ballard v. Brummit*, 4 Strob. Eq. 171 (money received through mistake); *State v. Bond*, 121 Ind. 187 (payment made to guardian by mistake); *Grimes v. Commonwealth*, 4 Litt. 1, 4, holding surety not liable for proceeds of sale of land sold before authorization of sale by statute.

⁷ *Carr v. Askew*, 94 N. C. 194, 207; *Burke v. Turner*, 90 N. C. 588, holding sureties liable under similar circumstances.

dian, and his sureties are liable therefor.¹ So where a guardian surrendered his office in March to one whom he supposed to be his successor, but who was not regularly appointed until the following December, but acted as such in good faith, the management of the estate from March to December must be treated as the exercise of an agency of the former guardian, whose bond is responsible for any loss arising therefrom.² Although sureties may not be held liable for misappropriation of assets made before they became sureties, yet if one by his own wrong constitutes himself the debtor to a minor and is then appointed his guardian, it is a breach of his duty, and therefore of his bond, if he fail to charge himself as such guardian with a sum of money equivalent to his indebtedness to the ward; he will in law be deemed to have transferred to himself such money in his representative capacity, for which his sureties will be held liable.³ And so the sureties are liable for money of the ward which the guardian improvidently loans out on insufficient security, although the guardian's administrator, after his death, tenders the note given by the borrower to the new guardian.⁴ And for a conversion of the ward's funds to his own use, the guardian's sureties are liable, notwithstanding a succeeding guardian, or the administrator of the converting guardian, might also be liable.⁵

So for a debt due to a minor before the debtor was appointed his guardian.

But the sureties are not liable for the non-payment of a note given by the guardian, and signed by him as guardian, for board and tuition of his ward.⁶

¹ *Todd v. Davenport*, 22 S. C. 147, 150.

² *Jennings v. Copeland*, 90 N. C. 572, 576.

³ *Sargent v. Wallis*, 67 Tex. 483, 487, the court applying the doctrine stated in the text equally to executors, administrators, and guardians; it is to be noticed, however, that the liability of sureties of executors and administrators in this respect is different in different States; in some of them it is held that debts due to a deceased person by his executor or administrator constitute assets in favor of the estate as so much money; while in other States they are treated like other choses in action, and the sureties are not liable if the principal in the bond was, at the time of his appointment, insolvent, and remained so until the time of accounting:

see *Woerner on Am. Adm.*, §§ 311, 512.

So in a recent Kentucky case, the court seems careful to qualify the liability of the surety for the guardian's debt before appointment, to a case where the principal is solvent, and hence able to pay: *Black v. Kaiser*, 16 Southwestern, 89. See also *Fogarty v. Ream*, 100 Ill. 366, 377, where the surety was not permitted to show that the money, with which the insolvent principal charged himself as due to his ward, had been squandered before he was appointed guardian.

⁴ *Richardson v. Boynton*, 12 Allen, 138, 140.

⁵ *State v. Gilmore*, 50 Mo. App. 353.

⁶ *McKinnon v. McKinnon*, 81 N. C. 201, 203.

In many of the States, guardians are required to give special bonds on applying for leave to sell the ward's real estate.¹ Where such bond is required by statute as a prerequisite to the sale, or by order of the court, the sale may be void,² in which case the

omission to give the special bond is held not to constitute a breach of the general bond;³ but for money received for the rent of lands leased by the guardian, notwithstanding the requirement of the statute of a

special bond in such case, the sureties on the general bond are liable; the leasing of the land without giving the special bond is itself a breach of the general bond.⁴ But where a guardian has given both a general guardianship bond and a special bond to account for the proceeds of the sale of real estate, the question

often arises whether the sureties on the one or those on the other bond are liable for the proceeds not accounted for by the principal, or for any loss suffered by the ward on account of negligence or bad faith in selling or failing to sell. Schouler, in his work on Domestic Relations, suggests that the best authority is in favor of charging the latter and not the former

sureties for the guardian's misapplication, of the proceeds of sale.⁵ This view is sustained by the reasoning of courts, that the conversion of real into personal estate is not regarded as among the general duties or functions of a guardian, the due performance of which is guaranteed by the sureties on a general guardian's bond, but as a special trust, superadded to that of guardian, placing in the hands of the guardian for special purposes, independently of the guardianship, to be separately accounted for, the proceeds of the sale; and as a condition precedent to which he is to give bond with sureties conditioned to observe the requirements of the law in the sale and to invest and account for the proceeds according to law.⁶ From which it follows that for the proceeds of such

¹ See *post*, § 76, as to requirement of special bond.

² *Vanderburg v. Williamson*, 52 Miss. 233, 235; *Williams v. Morton*, 38 Me. 47, 50; *Williams v. Reed*, 5 Pick. 480; *McKeever v. Ball*, 71 Ind. 398, 406.

³ *Williams v. Morton*, 38 Me. 47; *Lyman v. Conkey*, 1 Metc. (Mass.) 317, 321; *Shelton v. Smith*, 3 Baxt. 82; *Warwick v. State*, 5 Ind. 350, 352; *Andrews' Heirs*, 3

Humph. 592; *Commonwealth v. Pray*, 125 Pa. St. 542.

⁴ *Wann v. People*, 57 Ill. 202, 205.

⁵ *Schoul. Dom. Rel.* § 369.

⁶ *Blauser v. Diehl*, 90 Pa. St. 350; *Lyman v. Conkey*, 1 Met. 317, 321 (a case growing out of the guardianship of a lunatic, but in every respect applying to that over a minor); *Madison County v. Johnston*, 51 Iowa, 152; *Reno v. Tyson*, 24 Ind.

sale the sureties on the general guardian's bond are not, and the sureties on the special bond are, liable.¹ And the sureties on the special bond cannot escape liability by showing that the guardian charged himself with the proceeds of the sale, in his annual settlement, and that at the time of making such settlement he had the money in his possession;² nor does the production of the purchase-money to the court discharge the sureties, if it was withdrawn, and not paid to the parties entitled to receive the same.³ It is obvious, however, that the sureties on the special bond are not, and those on the general bond are, liable for such proceeds when they come into the hands of the guardian *as such*, that is to say, where the special purpose or trust has ceased, and nothing remains to be done but for the guardian to pay the money to the ward or to a successor;⁴ or where the sale was by order of another court,⁵ or on the petition of some other person.⁶ And this on the theory, that where the right of receiving a fund as general guardian, and the duty to pay it as special guardian, or trustee, unite in the same person, the law presumes a performance of the duty, unless the duty to pay has been extinguished before the duty devolved upon him as general guardian to transfer the fund to himself in that capacity.⁷ And so where money was paid to a guardian by the purchaser of land, on condition that the sale be approved by the court, and the sureties on the guardian's

although the guardian has charged himself with the proceeds.

But if the special purpose or trust has ceased, the general bondsmen are liable for a subsequent conversion.

56, 59; *State v. Harbridge*, 43 Mo. App. 16, citing many cases, 19.

¹ *Madison County v. Johnston*, 51 Iowa, 152, citing many authorities, p. 155; *Brooks v. Brooks*, 11 Cushing, 18, 23; *Potter v. State*, 23 Ind. 607, 609, referring to earlier Indiana cases; *Bunce v. Bunce*, 65 Iowa, 106; *Morris v. Cooper*, 35 Kans. 156, 160; *Henderson v. Coover*, 4 Nev. 429, 433; *Andrews' Heirs*, 3 Humph. 592; *Judge v. Toothaker*, 83 Me. 195; *Williams v. Morton*, 38 Me. 47, 51; *Muir v. Wilson*, Hopk. Ch. 512; *McKim v. Morse*, 130 Mass. 439; *Shelton v. Smith*, 3 Baxt. 82; the fact that the surety bought the land and paid the guardian for it is no defence to his liability: *Winlock v. Winlock*, 1 Dana, 382.

² *State v. Colman*, 73 Mo. 684. It would seem to result from this case that under

these circumstances the sureties on both the general and the special bond ought to be held liable; and see the cases *infra*, holding the general bondsmen liable if the money came into the guardian's hand as such.

³ *State v. Seele*, 21 Ind. 207.

⁴ *Fay v. Taylor*, 11 Metc. (Mass.) 529, 534; *Smith v. Gummere*, 39 N. J. Eq. 27, 35; *Tuttle v. Northrop*, 44 Oh. St. 178, 183.

⁵ *Taylor v. Taylor*, 6 B. Mon. 559, approving *Withers v. Hickman*, 6 B. Mon. 292, in both of which cases bond had been taken by the Chancellor ordering the sale.

⁶ *Colburn v. State*, 47 Ind. 310, 313; *Hooks v. Evans*, 68 Iowa, 52.

⁷ *Gray v. Brown*, 1 Rich. (S. C.) 351, 359, affirmed in *Pratt v. McJunkin*, 4 Rich. (S. C.) 5, 8.

general bond were released by the giving of a new bond before approval of the sale, it was held that the sureties on the old bond were not liable for conversion of the money, because the guardian had no authority to receive the money until the confirmation of the sale, which took place after the new bond had been given.¹ For the same reason, it was held that where a guardian, licensed to sell real estate for the purpose of investment, did not duly invest, but charged himself with the proceeds and with interest thereon from year to year in his general guardianship account, he was responsible for such proceeds on the special bond, but for the interest thereon upon his general bond.² The sureties on a general bond are liable, as well as those on a special bond, for the sale of real estate, if the different funds have been so mixed, and the account so kept that a proven defalcation cannot be identified with either fund.³

But there are decisions holding the special bond given for the sale of the ward's real estate to be merely cumulative or additional to the original general bond, and, therefore, the sureties on the special bond not liable until the remedy on the general bond has been exhausted.⁴ These cases proceed, of course, upon the theory that the original guardian's bond conditions a faithful performance of all the duties of a guardian to his ward, including the paying over of any money received by him for the ward, whether from the sale of real estate, or from any other source. Where the statute admits of such construction, this is a necessary result; for in such case no special bond is necessary, unless deemed so by the court in contemplating the increase of assets by the sale of real estate which the original bond may not be sufficient in amount to protect.⁵ So it has been held in some States that a bond given by a guardian, as required by statute, in procuring a decree for the sale of the ward's real estate, is a precautionary measure, as additional security, and does not discharge the sureties on the original guardian's bond, but that the sureties in both bonds are equally

Sureties on general bond held primarily, on the special bond conditionally, liable.

¹ *State v. Cox*, 62 Miss. 786, 790.

² *Mattoon v. Cowing*, 13 Gray, 387.

³ *Yost v. State*, 80 Ind. 350 (at least *pro rata*); *State v. Cox*, 62 Miss. 786; *Tuttle v. Northrop*, 44 Oh. St. 178, 183.

⁴ *Salyer v. State*, 5 Ind. 202, 206; *Hart v. Stribling*, 21 Fla. 136, 140.

⁵ *Wade v. Graham*, 4 Ohio, 126; *Salyer v. Ross*, 15 Ind. 130, and *Clarke v. West*, 5 Ala. 117, 128,—all three cases of administrator's sureties, involving the same principles applicable to guardian's sureties.

liable to the ward as joint sureties.¹ Where the statute requires no special bond to be given as a condition to the sale of the ward's real estate, the sureties on the guardian's general bond are self-evidently liable for any defalcation in accounting for the proceeds of such sale.²

The validity of a special bond given for the sale of a ward's real estate is not affected by a subsequent change of the terms of the order of sale.³

Change of order to sell does not invalidate bond.

The sureties on the bond of a first guardian are not released from liabilities for his default by the subsequent negligence of the second guardian in failing to obtain payment of the amount due by the first guardian from property standing in the latter's name.⁴

Where a joint bond is given by several persons appointed guardians to the same minor, they are liable for the acts of each other, unless the bond itself shows that they did not intend to become bound for each other's default.⁵ While this principle is analogous to that governing joint bonds of executors and administrators,⁶ resting upon the doctrine that although there is no joint liability for the separate acts of joint executors or administrators, yet having given a joint bond, each one of the principals has made himself liable as surety for the separate acts of each of the others, and that the proper course to avoid such liability is for each of the joint guardians to give a separate bond, it has not received universal sanction. Chancellor Sanford, in the thoroughly considered case of *Kirby v. Turner*,⁷ points out that the bond does not create the trust, nor define its nature and powers, nor vary the obligations of the guardians as defined by the law; that it binds them according to their legal obligations as guardians only, rendering them jointly liable for joint acts, and each severally for his own acts; and that the principals in such bond, though expressed to be joint and several, do not become sureties for each other.⁸

Liability of joint guardians on a joint bond for each other's defaults.

¹ *Elbert v. Jacoby*, 8 Bush, 542, citing *Withers v. Hickman*, 6 B. Mon. 292; *State v. Cox*, 62 Miss. 786, 790.

² *State v. Bilby*, 50 Mo. App. 162.

³ *Stevenson v. State*, 69 Ind. 257, affirmed in *Stevenson v. State*, 71 Ind. 52, 54.

⁴ *Commonwealth v. Julius*, 34 Atl. (Pa.) 21.

⁵ *Williams v. Harrison*, 19 Ala. 277,

283; *Freeman v. Brewster*, 93 Ga. 648, 651.

⁶ See Woerner on Adm. § 258.

⁷ Hopk. Ch. 309.

⁸ The words "jointly and severally," contained in the bond, are construed as referring to the nature of their functions, which are joint and several; that under a literal construction of the statute each one of the joint guardians would be re-

The liability of sureties on guardians' bonds, whether in a suit at law on the bond, or proceedings in the Probate Court, or in a court of chancery, is self-evidently limited to the penalty expressed in the bond,¹ plus interest thereon after the liability of the surety was fixed and ascertained.² "It is a settled rule of law," says Mitchell, J., in the case of *Tomlinson v. Simpson*,³ "that a surety is not to be held beyond the terms of his contract. The claim against him is *strictissime juris*. Nothing can be clearer, both upon principle and authority, than that the liability of a surety is not to be extended by implication beyond the precise terms of his bond. To the extent and in the manner pointed out in his obligation, he is bound, and no further. He has a right to stand on the very terms of his contract." On the same principle it was held that a guardian, who was a widow entitled to dower in the premises sold, could not lawfully increase the liability of her sureties on the bond given by her in the proceedings of sale, by voluntarily relinquishing her right of dower.⁴ This seems to be the American doctrine applicable to actions on penal bonds.⁵ In Pennsylvania, it is held, that where a surety becomes such upon an agreement made with the mother of the wards and their counsel, under sanction of the court, after the guardian and original sureties had become insolvent, that he was not to be held liable beyond the balance in favor of the wards shown by the accounts then filed, the agreement is binding upon the wards; and that they cannot have the benefit of the surety's obligation and yet repudiate the conditions upon which it was assumed.⁶

So the well-known principle, that any agreement between creditor and principal, which varies essentially the terms of the contract by which the surety is bound, without the consent of the surety, will release the surety's liability,⁷ is fully applicable to sureties

quired to give a separate bond, and that where all give a joint and several bond, it must have the effect of separate bonds, rendering all liable for their joint acts, and each for his own separate act: *Kirby v. Turner*, Hopk. Ch. 309, 331 *et seq.*

¹ *Anthony v. Estes*, 101 N. C. 541, 545; *Wilson's Case*, 38 N. J. Eq. 205, 207; *Meadows v. State*, 114 Ind. 537.

² *Wilson's Case*, 38 N. J. Eq. 205, 207; *Tyson v. Sanderson*, 45 Ala. 364, 369;

Commonwealth v. Forney, 3 Watts & S. 353, 358; *Clark v. Wilkinson*, 59 Wis. 543, 553.

³ 33 Minn. 443, 446.

⁴ *Chandler v. Birkholm*, 44 N. J. Eq. 554, 561.

⁵ *Long v. Long*, 16 N. J. Eq. 59, 65, and authorities there cited.

⁶ *Woomer's Appeal*, *alias* *Spath's Estate*, 144 Pa. St. 383, 387, 390.

⁷ 2 Brant on Suretyship, p. 552, § 378.

on guardians' bonds. If, therefore, an agreement between the guardian and his ward, that the property in the guardian's hands, instead of being turned over to his ward, may be retained by the guardian and used in his business, or in the joint business of him and his ward, be binding on the ward, without the consent of the guardian's surety, the latter is thereby released from liability on his bond,¹ and may plead such agreement as a release in an action on his bond; and the invalidity of such agreement, if relied on as a defence to the plea, should be set up in reply, and proved by the plaintiff.²

In equity the court will, according to well-settled principles, subject the estate of a deceased guardian or committee in the hands of his personal representative before decreeing against his sureties.³

§ 42. *Duration of Liability of Sureties on Guardians' Bonds.* — As the sureties on a guardian's bond are liable for all the property that has come to the hands of their principal, or ought to have come to his hands by the exercise of due diligence, so their liability continues as long as that of the guardian; nor does it, for any liability accrued, terminate when the authority of the guardian ceases, either by his or his ward's death, his resignation or removal,⁴ or, it may be, even when the remedy against the principal is barred. For the rule, that mere indulgence to the principal debtor, at the will of the creditor, however long continued, and whatever may be the consequence, will not operate to discharge a surety,⁵ is held applicable to sureties on guardian's bonds.⁶ Hence, since the

Sureties' accrued liability does not cease with the cessation of the principal's authority.

¹ *People v. Seelye*, 146 Ill. 189, 224.

² *People v. Seelye*, 146 Ill. 189, 225.

³ *Pannill v. Calloway*, 78 Va. 387, 397.

⁴ Thus a guardian, having resigned, who is reappointed in another county, where he gives bond and charges himself with the sums in his hands under his first appointment, does not thereby discharge his first bondsmen from liability for a previous defalcation: *Yost v. State*, 80 Ind. 350; to same effect: *Naugle v. State*, 101 Ind. 284, 287; *Bell v. Rudolph*, 70 Miss. 234, 240. In Louisiana, the recording of a tutor's bond makes it a lien to secure the debt to the ward; and it is held that the omission to mention this

mortgage in the homologation of the tutor's account does not impair the validity of the mortgage: *Taylor v. Marshall*, 43 La. An. 1060.

⁵ *Schroepell v. Shaw*, 3 N. Y. 446, 455; *Humphreys v. Crane*, 5 Cal. 173, 175; *King v. State Bank*, 9 Ark. 185, 189.

⁶ *Ashby v. Johnston*, 23 Ark. 163, followed in *Smith v. Smithson*, 48 Ark. 261. Obviously, this rule does not apply where the ward extends the time of payment by a valid contract for a valuable consideration, without the consent of the surety, in which case the latter is discharged: *Hart v. Stribling*, 25 Fla. 435, 451.

sureties are liable for the money and property of the ward in the hands of the guardian at the time of his death,¹ it is not necessary that an action should be resorted to against his representatives before the action will lie against the sureties;² nor that a previous demand be made;³ but whether they are discharged because the obligees omitted to prosecute their claim against the estate of the deceased guardian until barred by the statute of non-claim, has been differently held.⁴ The liability of the surety's estate continues for any default of the principal committed after the sureties' death, until the authority of the guardian ceases.⁵ The act of a guardian inducing his ward, on attaining majority, to accept, in payment of the amount shown to be due on the guardian's account, a worthless note and mortgage, is a violation of his duty for which his sureties are liable, though the account rendered was correct.⁶ And while sureties are liable for an amount found to be due the ward in a settlement between him and his guardian, and are not discharged by a decree of discharge, made by the consent of the ward, obtained by fraudulent representations, yet they are not liable for costs of an action to set aside such decree, where the settlement itself is not complained of; the

Sureties liable without previous action against the principal.

Liability after principal's death.

¹ See *ante*, § 41.

² *State v. Thorn*, 28 Ind. 306, 310.

³ *Higgins v. State*, 87 Ind. 282, 286; *Buchanan v. State*, 106 Ind. 251, 255, citing earlier Indiana cases; *Rogers v. Mitchell*, 1 Metc. (Ky.) 22, 26, holding that where action is brought against the guardian's executor, and also against the sureties on the guardian's bond, without demand of the executor, the executor may compel the plaintiff to dismiss as to him, but the latter may proceed against the sureties. So it is held that a ward need not notify the sureties on his guardian's bond as to the guardian's dishonesty in making final settlement, in order to hold them liable: *Douglass v. Ferris*, *infra*.

⁴ Affirmed in *Glass v. Woolf*, 82 Ala. 281; and see *Brooks v. Rayner*, 127 Mass. 268; negatived in *Ashby v. Johnston*, *supra*; *Chapin v. Livermore*, 13 Gray, 561; *Smith v. Smithson*, 48 Ark. 261.

⁵ *Voris v. State*, 47 Ind. 345, 349, affirmed in *Cotton v. State*, 64 Ind. 573, 578; *Wood v. Leland*, 1 Metc. (Mass.)

387; *Richardson v. Boynton*, 12 Allen, 138; *Moore v. Wallis*, 18 Ala. 458, 463; *Anderson v. Thomas*, 54 Ala. 104; *Hutchcraft v. Shrout*, 1 Th. B. Mon. 206. In New York, where before the statute of 1877 the death of a joint surety discharged his estate from all liability under such contract, it is held that the amendment of the statute providing that the estate of a joint surety shall not be discharged by his death, did not affect a bond given prior thereto, and that the death of a joint surety in 1887 discharged his estate from liability: *Douglass v. Ferris*, 18 N. Y. Supp. 685, 689; but this principle has no application to a several, as well as joint, bond: *Douglass v. Ferris*, 138 N. Y. 192, 207, citing other authorities. In *Brooks v. Rayner*, 127 Mass. 268, it was held that a bill in equity does not lie in such case because application should be made to the Probate Court under the Massachusetts statute.

⁶ *Douglass v. Ferris*, 18 N. Y. Supp. 685, 689.

guardian having accounted, after the ward's majority, subsequent transactions are not covered by the bond.¹

The fact that the ward signed a receipt in full for the money found to be due her on final settlement does not estop her, after the lapse of six or seven years, from asserting her claim against the sureties on the guardian's bond. It is no defence to the surety, that at the time of the guardian's death there were assets sufficient to pay the amount due his ward, which assets came to the hands of his administrator, and were by him wasted;² or that the ward delayed action, after arriving at age, to compel the guardian to settle his account in the Probate Court, although the guardian has, in the mean time, become insolvent.³ It is, of course, no defence to a surety on the guardian's bond, that the money was squandered by the guardian with his ward's consent.⁴ The subject of the relative liability between sureties on the bond of a guardian, and those of a successor after his removal or death, and between those on an original and on an additional guardian's bond, and between those of a guardian, and of the same person as administrator of his deceased ward, will be considered later on.⁵

But sureties, although liable, it may be, for moneys received by the guardian, or due by him to his ward, before the execution of the bond, are not liable for what he has received or done after the expiration of his authority.⁶

Sureties not liable for principal's acts after expiration of his authority.

Actions on guardian's bonds are barred by the statute of limitations, which is, in some States, different from the general statute. Thus, for instance, it was at one time held in Indiana, that actions on guardians' bonds are, by analogy with bonds of executors and administrators, barred in three years from the final settlement;⁷ but in a later case it is held that the statute of limitations

Limitation of actions against sureties on guardians' bonds.

¹ *Douglass v. Ferris*, 138 N. Y. 192, 208.

² *Humphrey v. Humphrey*, 79 N. C. 396.

³ *Newton v. Hammond*, 38 Oh. St. 430, 437; *Walling's Case*, 35 N. J. Eq. 105, 107. See to similar effect: *Douglass v. Ferris*, *supra*.

⁴ *Judge of Probate v. Cook*, 57 N. H. 450.

⁵ *Post*, § 43. See also § 102, as to accounting where one succeeds himself in a new fiduciary capacity.

⁶ *Merrells v. Phelps*, 34 Conn. 109, 112; *Shelton v. Smith*, 3 Baxt. 82, 84.

In Virginia, it was held that sureties were liable for moneys paid to a guardian whose powers had been revoked, if the payment was made in good faith without knowledge of the revocation, the party paying believing the guardian to be so in fact: *Sage v. Hammonds*, 27 Gratt. 651, 660.

⁷ *State v. Hughes*, 15 Ind. 104 (the ward being of age and under no disability).

in favor of the obligors on a guardian's bond is six years from the time the cause of action accrued, but the ward is allowed two years after attaining majority.¹ So, by statute, in North Carolina, the plea of limitation in bar after three years is good in favor of sureties, though not in favor of the guardian.² In Massachusetts, the action on the guardian's general or special bond is barred after four years from the cessation of the guardian's authority, whether by removal, resignation, death of the guardian, or marriage of a female guardian, majority of the ward, or otherwise.³ So in Michigan,⁴ Ohio,⁵ South Carolina,⁶ Texas,⁷ and Vermont, action on the guardian's bond is barred on the expiration of four years after the discharge of the guardian;⁸ in Kentucky, five,⁹ and in Louisiana four, years after the ward's majority.¹⁰ And it is held in Kentucky that a delay of four years after knowledge of fraud in obtaining a discharge from the ward will estop the obligee in the bond as against the sureties.¹¹ In Mississippi, the statute of limitations begins to run in favor of principal and surety after the guardian has made final settlement with the proper court, and the remedy is barred in seven years; but if the guardian do not denude himself of his trust by a final settlement, the statute does not run, and neither he nor his sureties are protected by it.¹² In Maryland, the period of limitation is twelve years,¹³ and begins on the day of the ward's majority.¹⁴

In the absence of a statutory limitation of suits on guardian's bonds, the limitation prescribed for suits on sealed instruments is applicable.¹⁵ The limitation runs from the time the cause of action accrues, and not from the date of the bond; the cause of action does not accrue until there is a breach of the bond,¹⁶ and though a breach of the bond have occurred which is barred by the statute, this will not bar the action for subsequent breaches.¹⁷

¹ *Peelle v. State*, 118 Ind. 512, 515.

² *Hodges v. Council*, 86 N. C. 181; *Williams v. McNair*, 98 N. C. 332; *Norman v. Walker*, 101 N. C. 24.

³ *Loring v. Alline*, 9 Cush. 68.

⁴ *Tate v. Stevenson*, 55 Mich. 320, 322.

⁵ *Favorite v. Booher*, 17 Oh. St. 548, applying the four years' limitation in favor of executors and administrators to guardians.

⁶ *Motes v. Madden*, 14 S. C. 488.

⁷ *Marlow v. Lary*, 68 Tex. 154, 156.

⁸ *Probate Court v. Child*, 51 Vt. 82, 85.

⁹ *Johnson v. Chandler*, 15 B. Mon. 584, 590; *Brunk v. Means*, 11 B. Mon. 214.

¹⁰ *Gallion v. Keegan*, 39 La. An. 468.

¹¹ *Aaron v. Mendel*, 78 Ky. 427.

¹² *Nunnery v. Day*, 64 Miss. 457, 459; *Bell v. Rudolph*, 70 Miss. 234.

¹³ *Byrd v. State*, 44 Md. 492, 501.

¹⁴ *State v. Henderson*, 54 Md. 332, 343.

¹⁵ *Ragland v. Justices*, 10 Ga. 65, 74.

¹⁶ *Bonham v. People*, 102 Ill. 434.

¹⁷ *McKim v. Williams*, 134 Mass. 136.

So in Missouri, where the statutory limitation of suits on bonds, notes, and other instruments in writing is ten years, the statute runs in favor of principal and surety on a guardian's bond from the date of the final adjudication on the final settlement.¹

It is held that under § 5068 R. S. U. S., the contingent liability of a surety on a guardian's bond was provable against him in bankruptcy proceedings; and that his discharge in bankruptcy released him from such liability under § 5117 R. S. U. S.;² but the liability of the guardian is not affected by his discharge in bankruptcy.³ But the plea that the guardian had settled his account in the Probate Court, on removal, and that his successor had presented a claim for the amount found due, to the assignee under the guardian's assignment for the benefit of creditors, and received an equal quota from such assignee in good faith for the benefit of the ward's estate, was held a good plea in defence of an action on the bond; and the discharge of the guardian by the voluntary act of the successor, in good faith, but without the consent of the sureties, will equally release them.⁴

Discharge in bankruptcy a bar to suit against the surety,

but not against the guardian.

So a surety may compel the claim to be proved in the Probate Court within the time prescribed by statute, or pay the demand, and cause it to be allowed against the estate;⁵ or obtain an order on the ward to bring suit on the bond within a time to be named, if after his majority and after final accounting he neglects for an unreasonable time to do so, in default of which the sureties may be discharged.⁶

Surety may terminate his liability by proceeding against the obligee, or by paying the guardian's indebtedness.

The allegation that a guardian *pretended* to invest his ward's funds in bonds, without the sanction of an order of court, while in reality he converted the money to his own use, is a sufficient allegation of fraud to take the action out of the operation of a statute of limitations which excepts cases of fraud.⁷

Limitation does not run in favor of one liable for the principal's fraud.

The citation to a surety requiring accounting after a decree on

¹ State v. Hoshaw, 86 Mo. 193, 197.

² Davis v. McCurdy, 50 Wis. 569; Reitz v. People, 72 Ill. 435; Jones v. Knox, 46 Ala. 53.

³ Maybin, in re, 15 N. Bankr. R. 468, 470.

⁴ Ordinary v. Dean, 44 N. J. L. 64.

⁵ Ashby v. Johnston, 23 Ark. 163,

165.

⁶ Vermilya v. Bunce, 61 Iowa, 605.

⁷ Ordinary v. Smith, 55 Ga. 15.

final settlement, is not an action at law or in equity within the meaning of the statute of limitation; and his response to such citation, the guardian having died, does not revive a right to recover from the surety any unpaid balance.¹

§ 43. **Relative Liability of Sureties on Successive Bonds of Guardians.** — The general rule is, that sureties are not liable for

Sureties not
liable for past
defaults, unless
so intended.

past defaults unless made so by the terms of the bond;² but where it is the manifest intention that the new bond shall stand in lieu, or take the place of the former bond, they are liable for any previous misconduct of the principal.³ So, where a new or additional bond has been

Sureties on a
bond given for
better protec-
tion of the
ward are liable
as co-sureties
with those on
the old bond,
and these con-
tinue liable as
co-sureties
with those on
the new bond.

given by a guardian, under an order of the Probate Court made either *sua sponte*, or in response to the petition or motion of some person in behalf of the ward, or at the instance of the guardian himself,⁴ for the better security of the ward's interest, the sureties on the original as well as on any later bond are liable as co-sureties, for any breach of the bond happening either before or after the execution of the later bond.

The reason therefor is obvious: both bonds are given *to protect* the interests of the ward; the latter *to strengthen* the security of the former bond deemed insufficient, which is accomplished by *adding to* the first the security afforded by the second bond, so that *the two together* may constitute the sufficient security contemplated by the law. If the giving of the new bond should operate a discharge of the sureties on the old bond, or if the sureties on the new bond were held not liable for a conversion before the giving of the new bond, the order to give such new bond might operate disastrously to the ward instead of benefiting him.⁵ It is not necessary, therefore, in a suit on an additional bond, to allege or show that the security of the original bond has been

¹ *People v. Stewart*, 29 Ill. App. 441.

² *Farrar v. United States*, 5 Peters, 373, 388; *State v. Jones*, 89 Mo. 470, 480; *State v. Finn*, 23 Mo. App. 290, 293; *Sebastian v. Bryan*, 21 Ark. 447, 449.

³ *State v. Finn*, 98 Mo. 532, 537; *Knox v. Kearns*, 73 Iowa, 286, 288.

⁴ *Loring v. Bacon*, 3 Cush. 465.

⁵ *McWilliams v. Norfleet*, 60 Miss. 987, 995; *State v. Hull*, 53 Miss. 626, 645; *Stevens v. Tucker*, 87 Ind. 109, 122; *Cobb*

v. Haynes, 8 B. Mon. 137, 139; *State v. Drury*, 36 Mo. 281, 286, pointing out the plain intention of the law "that the security should be accumulative, and not an entire substitution of the one bond for the other;" *Eichelberger v. Gross*, 42 Oh. St. 549, 553; commented on in *Foster v. Wise*, 46 Oh. St. 20, 25; *Odom v. Owen*, 2 Baxt. 446, 452; *Douglass v. Kessler*, 57 Iowa, 63; *Jones v. Hays*, 3 Ired. Eq. 502, 507.

exhausted;¹ nor are the sureties on the old bond discharged by the giving of a new bond under an order to give other and further security, though the order was made on the petition of the sureties on the old bond.² The principle upon which the sureties of an original, as well as those of an additional, bond are liable for a substantially single act, constituting a breach of both bonds, is illustrated in a Missouri case, in which a guardian, after having converted his ward's estate to his own use, was ordered to give a "new and additional bond," which was given with new sureties to the satisfaction of the court; but subsequently a successor was appointed, who brought suit against the former guardian and his sureties on the "new and additional bond" and recovered judgment thereon. In a subsequent suit against the former guardian and his sureties on the original guardianship bond, the defendants contended that the settlements of the curator, made both before and after the giving of the second bond, constituted judgments conclusive in exoneration of the sureties on the first bond; and that the plaintiff, having obtained one judgment upon the second bond, was not entitled to have another judgment upon the first bond for the same breach. This contention was overruled by the court, holding that the breaches assigned in the two suits are not identical: those alleged in the first suit (on the second bond) consisted merely in the refusal or failure of the removed curator to account for and pay to his successor the balance found to be in his hands by the last settlement; while those alleged in the second suit (on the original bond) averred a breach by the conversion of the ward's estate to the curator's use, so that there was in reality no estate of the ward in his hands at the time of his last settlement, nor at the time the second bond was given. Thus, there was a breach entitling the beneficiary to recover under the first bond, by reason of the wrongful conversion; and a breach entitling to a recovery under the second bond, by reason of the failure to comply with the order to turn over the estate to the successor.³ The sureties on the last bond

Breach under first bond for conversion of the fund,

under second bond for failure to turn over.

¹ *Allen v. State*, 61 Ind. 268, 275, relying on *Shook v. State*, 53 Ind. 403, 408 (a case on an administrator's sale bond); the new bond is given for faithful performance of the duties of guardian from the beginning: *Bell v. Jasper*, 2 Ired. Eq. 597, 600.

² *Commonwealth v. Cox*, 36 Pa. St. 442, 444; *McGlothlin v. Wyatt*, 1 Lea, 717; and see *Crook v. Hudson*, 4 Lea, 448, 450, holding sureties on second bond primarily liable.

³ *State v. Drury*, 36 Mo. 281; *State*

are liable, *prima facie*, for the amount shown to have been in the guardian's hands remaining unaccounted for, although received before the bond was given; but the sureties on the prior bond may be held liable on proof that the conversion took place during the period covered by it,¹ although the guardianship had been revoked, and under a new appointment of the same person a new bond with new sureties had been given.²

But provision is made in most or all of the States for the relief of sureties who may deem themselves in jeopardy by the conduct of their principal, or for other reason; they may apply, by petition or motion, to the Probate Court to require the guardian to give a new bond, or in default thereof to remove the guardian.³ And so relief may

Sureties may be relieved from future liability.

be had in a court of equity.⁴ But to effect the release of a surety on the guardian's bond, the statute must be strictly complied with; and where this is not done, the declaration of the court accepting one person as surety for another already bound, and making an order to discharge the latter from liability, is nugatory.⁵ In such a case the former sureties remain liable for any

Sureties continue liable until new bond given for their relief,

act of the guardian until the new bond shall have been executed and approved,⁶ no matter though the court may make an order discharging them,⁷ for the court has no authority to release a surety by a mere

v. Fields, 53 Mo. 474, 477; *State v. Williams*, 77 Mo. 463, 471. But in the case of *State v. Jones*, 89 Mo. 470, 479 (on the bond of a guardian of an insane person), the principle distinguishing the relative liability on additional bonds given for the protection of the ward from that on bonds given for the relief of sureties on the original bond, seems to be disregarded, and the sureties on the additional bond exonerated according to the well-known general proposition above stated, that sureties on a bond are not liable for past defaults, unless made so by the terms of the bond.

¹ *State v. Paul*, 21 Mo. 51, 56; *Parker v. Medsker*, 80 Ind. 155, 158.

² *Bellune v. Wallace*, 2 Rich. L. 80, 82 (Wardlaw, J., dissenting on the ground that by the new appointment the balance in the hands of the guardian before revocation was payable to him as guardian under the new appointment, and by opera-

tion of law *ipso facto* discharged the liability under the former appointment, p. 85); *Lee v. Lee*, 67 Ala. 406, 418.

³ *Kenrick v. Wilkinson*, 18 Ind. 206; *Dempsey v. Fenno*, 16 Ark. 491. But the relief will not be granted on the mere apprehension of loss or desire of the surety to be discharged; there must be proof of danger of suffering loss: *Coleman v. Lamar*, 40 Miss. 775, 777; unless authority to relieve the surety, for other, or without, reasons, is expressly granted by statute, as is the case, for instance, in Missouri: Sess. L. Mo. 1891, p. 217.

⁴ *Howell v. Cobb*, 2 Coldw. 104.

⁵ *Overfield v. Overfield*, 30 S. W. 994.

⁶ *Bryant v. Owen*, 1 Ga. 355, 371; *Conover's Case*, 35 N. J. Eq. 108.

⁷ *Polk v. Wisener*, 2 Humph. 520, affirmed in *Jameson v. Cosby*, 11 Humph. 273; *Justices v. Woods*, 1 Ga. 84, 87.

order to that effect.¹ Hence, where the new bond is void, the sureties on the old bond are not discharged by its approval;² but if approved in accordance with statutory provision, although the new surety merely sign the old bond, the old thereby becomes the new bond as to the new surety, saving the liability of all the other sureties, notwithstanding the change in the contract, whether the surety sign with them or separately.³ Upon the giving of the new bond the sureties on the old bond are discharged from liability for any subsequent acts of the guardian, although the new security prove insufficient, or the bond fatally defective,⁴ but remain liable for any breach already incurred,⁵ while those on the new bond become liable for any subsequent, and in most States for any prior breach.⁶ But the liability of the new sureties, on a bond given for the relief of the sureties on a prior bond, for breaches during the period of the prior bond, is not so generally recognized.⁷

but are discharged from liability for subsequent breaches.

Sureties on new bond liable for prior and subsequent breaches.

Where the statute requires periodical renewal of guardians' bonds, these are cumulative as to the ward; but among themselves the sureties on the several bonds are liable in the inverse order in which the bonds are given.⁸

Sureties on later bonds liable before those on prior bonds.

The rule, that the release of one of several co-sureties releases all, is held not applicable in case of the discharge of a surety on a guardian's bond by proceedings in court; hence,

¹ *McMath v. State*, 6 Harr. & J. 98. And so payment of the balance in hands of the guardian to the clerk, by order of the court, is not a good defence to either the guardian or his sureties in a suit on the bond, the clerk of the court having no authority under the statute to receive such money: *State v. Fleming*, 46 Ind. 206.

² *Justices v. Selman*, 6 Ga. 432, 442. So the mere giving of a new bond at the request of the surety on a prior bond has been held insufficient to discharge the old surety without an order of court to that effect: *Wilborne v. Commonwealth*, 5 J. J. Marsh. 617.

³ *Hammond v. Beasley*, 15 Lea, 618, 625.

⁴ *Hamner v. Mason*, 24 Ala. 480, 484; *Crawford v. Penn*, 1 Swan, 388.

⁵ *Armstrong v. State*, 7 Blackf. 81; *Spencer v. Houghton*, 68 Cal. 82; *State v. Page*, 63 Ind. 209; *Bell v. Rudolph*, 70 Miss. 234, 240.

⁶ Cases *supra*; *Bell v. Jasper*, 2 Ired. Eq. 597; *Steele v. Reese*, 6 Yerg. 263; *Ammons v. People*, 11 Ill. 6; *Tuttle v. Northrop*, 44 Oh. St. 178; *Clark v. Wilkinson*, 59 Wis. 543, 549; *Sayers v. Cassell*, 23 Gratt. 525.

⁷ *McWilliams v. Norfleet*, 60 Miss. 987; *Sebastian v. Bryan*, 21 Ark. 447, 449; *Lowry v. State*, 64 Ind. 421, 426, citing earlier Indiana cases to same effect; *Williams v. State*, 89 Ind. 570.

⁸ *Tennessee Hospital v. Fuqua*, 1 Lea, 608; *Crook v. Hudson*, 4 Lea, 448.

Release of a surety by order of court no release to his co-sureties.

Secus of release by the ward when of age.

where one or more of several joint sureties is released by the Probate Court, and a new bond given, the remaining sureties in the first, and the sureties in the second bond are all jointly bound.¹ But where the ward himself, on attaining majority, releases any of the sureties on his guardian's bond, all the sureties are thereby released, although they be expressly excepted from the operation of the instrument constituting the release.² And so, if a co-surety be released, by act of the obligees, the surety, unless he has consented thereto, has a right to demand the cancellation of the bond.³

§ 44. **Right to Contribution between Co-sureties on Guardians' Bonds.**—Since the obligees of a guardian's bond may enforce their right not only against the principal therein, but also against him and the sureties, or against one or more of the sureties alone, the natural principle of equity applies, that where one of several who have assumed a burden equally between them is compelled to discharge it, the others ought to contribute, each his share, so as to preserve equality.⁴ The obligation of co-sureties to contribute

In equity, sureties must contribute so as to equalize the burden,

no matter how they became co-sureties,

unless exonerated by contract.

to each other is not based on contract, but arises out of the equitable principle referred to, which is now recognized and enforced in courts of law as well as in chancery courts.⁵ It follows from this, that if the parties in an action for contribution are co-sureties, that is to say, if they are sureties for the same principal and the same obligation, by contracts which are the same in their legal operation, it matters not whether they have become so at the same time or at different times, by one or by several instruments, in penalties of the same or different amounts, or whether they knew or were ignorant of the existence of other sureties.⁶ It is indifferent, therefore, what the intentions of any surety in respect to the question of contribution was at the time he became such, unless expressed in the way of a contract between him and the other sureties.⁷

¹ *Frederick v. Moore*, 13 B. Mon. 470, 473; *Boyd v. Gault*, 3 Bush, 644, 647.

² *Tyner v. Hamilton*, 51 Ind. 259, including the principal: *Blow v. Maynard*, 2 Leigh, 29, 43.

³ *Succession of Pratt*, 16 La. An. 357.

⁴ *Rapp v. Masten*, 4 Redf. 76; *Young v. Shunk*, 30 Minn. 503 (a case, however, arising on a bond to a corporation).

⁵ *Story Eq. Jur.* § 495; *Brandt on Suretyship*, § 254; *Baylis on Suretyship*, p. 317.

⁶ *Young v. Shunk*, *supra*; *Bell v. Jasper*, 2 Ired. Eq. 597, 600; *Armitage v. Pulver*, 37 N. Y. 494, 498; *Bosley v. Taylor*, 5 Dana, 157.

⁷ *Young v. Shunk*, *supra*.

Co-sureties bound by different bonds, with penalties differing in amount, are liable to contribution in the proportion of the amounts of the penalty of the bond under which they are liable,¹ not exceeding, of course, the amount of the penalty.² But there seems to be some difference in the authorities on this point. Thus, it was held in Pennsylvania, in a case where two bonds had been given in unequal amounts, the first signed by three and the last by two sureties, that all of them were liable equally, each for one fifth of the whole amount of the debt of the principal.³ A similar view seems to have been taken in Indiana⁴ and Kentucky,⁵ although the point was not discussed nor expressly ruled in either of the cases cited.

Liability in proportion to amount of penalty,

never exceeding penalty.

The question of the proportionate liability to contribute, as affected by the solvency or insolvency of one or more of the sureties, has been held differently at law and in equity. At law it is held, that each surety is responsible to his co-surety for an aliquot proportion of the money for which they were bound, ascertained by the number of the sureties, without regard to the solvency of any one or more of them,⁶ while in equity, and in courts having statutory jurisdiction to this effect, the whole amount is contributed by the solvent sureties.⁷ But contribution can be had only when, and to the extent that, one co-surety may have paid more than his ratable proportion of the joint liability.⁸ The right to contribution extends to the personal representatives of a deceased as effectually as to a surviving co-surety.⁹ A surety who has left the State is in the same condition as if he were insolvent, and the solvent sureties,

Proportional liability affected by insolvency of one or more, at law,

in equity.

Representatives of deceased co-sureties liable to contribute.

¹ *Jones v. Blanton*, 6 Ired. Eq. 115, 120; *Jones v. Hays*, 3 Ired. Eq. 502, 509; *Loring v. Bacon*, 3 Cush. 465; and see cases cited in *Brandt on Suret.* § 288, note (3) on p. 424.

² *Bell v. Jasper*, 2 Ired. Eq. 597, 600.

³ *Commonwealth v. Cox*, 36 Pa. St. 442, 444.

⁴ *Stevens v. Tucker*, 87 Ind. 109, 122.

⁵ *Cobb v. Haynes*, 8 B. Mon. 137.

⁶ 1 *Parsons on Cont.* 35; *Samuel v. Zachary*, 4 Ired. L. 377, 380; *Powell v. Matthis*, 4 Ired. L. 83; *Moore v. Bruner*, 31 Ill. App. 400, 403; *Riley v. Rhea*, 5 Lea, 115; *Stothoff v. Dunham*, 19 N. J. L.

181, 185; *Morrison v. Poyntz*, 7 Dana, 307, 309.

⁷ *Waller v. Campbell*, 25 Ala. 544, 547. To same effect: *Klein v. Mather*, 7 Ill. 317, 324; *Burroughs v. Lott*, 19 Cal. 125; *Breckenridge v. Taylor*, 5 Dana, 110; *Magruder v. Admire*, 4 Mo. App. 133, 136; *Henderson v. McDuffee*, 5 N. H. 38, 40; *Mills v. Hyde*, 19 Vt. 59, 64; *Gross v. Davis*, 3 Pickle, 226, 230; *Liddell v. Wiswell*, 59 Vt. 365, 368.

⁸ *Gross v. Davis*, 3 Pickle, 226, 229.

⁹ *McKenna v. George*, 2 Rich. Eq. 15; *Stothoff v. Dunham*, 19 N. J. L. 181, 183.

or their representatives, who remain within the jurisdiction, are liable to contribute in equal proportions.¹

A surety on a guardian's bond, who has paid the amount due by the guardian under the finding of the Orphan's Court, for which the ward has obtained judgment against the sureties on the bond, may file a bill for contribution without first obtaining a judgment at law against his co-surety, and may also compel discovery and obtain relief if fraud be established.²

Money payable to the obligees in several bonds, in consequence of distinct breaches under each bond, is applicable, *pro rata*, upon the amounts due under each.³

A guardian may pledge his individual property to indemnify his surety, but not the property of his ward;⁴ but it is not against public policy for a guardian to agree with his surety to invest the ward's money in State bonds, and deposit them with the surety to indemnify him against loss.⁵ So a guardian may, on petition of his surety, be ordered to give counter-security;⁶ and on receiving such, the latter is bound to apply it to the benefit of his co-security equally with himself.⁷

It results from the equitable principle above mentioned, that the surety is entitled to the benefit of all the securities held by the obligees, as well as to contribution from all the sureties who have signed the bond with him; hence, he has a right to be discharged from a bond if any of the securities were lost by act of the obligees, or a co-surety released without his consent.⁸

The fact that one of the sureties on the guardian's bond was also surety on a note for the non-payment of which the sureties on the bond were liable, does not entitle the other surety to a judgment against him for the proportion of the note which he is required to pay.⁹

¹ McKenna v. George, *supra*.

² Neilson v. Williams, 42 N. J. Eq. 291. See, as to judgments against principals binding sureties, *post*, § 45.

³ Bond v. Armstrong, 88 Ind. 65, 69.

⁴ Poultney v. Randall, 9 Bosw. 232; Forsyth v. Woods, 11 Wall. 484 (case of an administrator agreeing to invest his firm with title to the assets).

⁵ Rogers v. Hopkins, 70 Ga. 454, 459.

⁶ Foster v. Bisland, 23 Miss. 296.

⁷ Field v. Pelot, McMullen Eq. 369.

⁸ Succession of Pratt, 16 La. An. 357; Bradly v. Trousdale, 15 La. An. 206. See *ante*, §§ 40, 43.

⁹ Johnson v. Hicks, 30 S. W. 3.

§ 45. *Sureties bound by Judgments against the Guardian.* — It is the undertaking of the surety on a guardian's bond that his principal shall discharge all his official duties; and since one of the duties of the guardian is to pay the amount found to be due by him to the ward by a court having jurisdiction for such purpose, it follows that the judgment to that effect must be binding upon the surety, unless obtained by fraud or mistake. Hence, it is held to be a well-settled principle that the sureties in a guardian's bond are *prima facie* bound by a recovery against their principal, although they were no parties to the suit; and that they can relieve themselves only by showing that the amount recovered was in excess of the amount to which plaintiff was entitled, or that he was not entitled to recover at all.¹ The binding effect of a judgment against the principal is in some States held to be conclusive upon the sureties, so that it cannot be attacked collaterally,² unless, of course, the order of the court is itself void, in which case the failure to comply with it constitutes no breach of the bond, and the sureties are not liable.³ So it is held in Illinois that the condition in a guardian's bond to make settlement in the County Court does not bind the sureties to an order made on settlement in the Probate Court, jurisdiction over "all unfinished business relating to guardianship matters" having been transferred by a statute passed after the ward's majority, but before final settlement of the guardian, from the County Court to the Probate Court.⁴ In assailing the judgment against a guardian for fraud or mistake, or on the ground that the guardian was a lunatic, or otherwise incompetent at the time of the judicial proceedings against him, the specific errors which are complained of should be pointed out by distinct averments.⁵ So the sureties in a suit on the bond will not be heard to

Sureties are *prima facie* bound by judgments against principal.

In some States conclusively.

Except for fraud or mistake.

¹ Parr v. State, 71 Md. 220, 234; Bradwell v. Spencer, 16 Ga. 578, 581; May v. May, 19 Fla. 373, 392; Hailey v. Boyd, 64 Ala. 399, 400, citing earlier Alabama cases; Fusilier v. Babineau, 14 La. An. 764, 767.

² Stovall v. Banks, 10 Wall. 583, 588 (a case on an executor's bond); Badger v. Daniel, 79 N. C. 372, 379; Knepper v. Glenn, 73 Iowa, 730; State v. Slaughter, 80 Ind. 597; Brodrib v. Brodrib, 56 Cal. 563, 564; Commonwealth v. Julius, 173 Pa. St. 322.

³ Gillespie v. See, 72 Iowa, 345, 347.

⁴ Seelye v. People, 40 Ill. App. 449, 454. This case holds, that a declaration, averring no other breach of the bond, is fatally defective; but that the transfer from the county to the Probate Court affected the validity of the bond in no respect except as it relates to settlement in the County Court.

⁵ Brodrib v. Brodrib, *supra*; to similar effect: Corbin v. Westcott, 2 Dem. 559.

question its correctness, or to demand a rehearing of the accounts, except for fraud or mistake.¹ So where a guardian disbursed large sums for necessities of the ward, without order of court, and, in ignorance of her rights, failed to take credit for these disbursements in her final account, although on a proper showing the court might have sanctioned the expenditure and allowed her credit therefor, the sureties were held bound by the adjudication on her final accounting, and were not allowed to set

No relief in equity. up the facts and secure such credit, no fraud being shown on the part of the guardian.² Nor will equity relieve the sureties on the ground that they were not made parties originally.³ Appeal from a decree of the judge of probate, settling the account of the principal, must be taken in the name of the accounting principal.⁴

But in Virginia it was decided that the sureties of an insolvent committee of a lunatic, who had supported the ward out of his own means, are entitled to have the credit for such support applied, in exoneration of their liability, in the accounting of their principal, although he himself had not made any charge therefor.⁵ So, in Indiana, sureties are allowed to plead in set-off, to an action on a guardian's bond, the indebtedness of the wards to the principal in the bond (although he be their father) for their board and maintenance.⁶ And in Kentucky it is held, that since the equities of the surety are purely derivative, he can, in a suit against him on the bond, make the same defences, and no other, that the guardian could if she, and not the surety, were contesting the right of recovery.⁷ In Mississippi, while the decree rendered against the guardian in her final account is conclusive against her, it is only *prima facie* evidence against the surety, who may, if he was not a party to the accounting by the principal, show, in defence of a suit against

¹ Gillett v. Wiley, 126 Ill. 310, 320, relying on Ammons v. People, 11 Ill. 6, and other Illinois cases; Braiden v. Mercer, 44 Oh. St. 339, 343; Shepard v. Pebbles, 38 Wis. 373, 378; State v. Hoshaw, 86 Mo. 193, 199; Byrd v. State, 44 Md. 492, 504; Scott's Account, 36 Vt. 297, 302. The order of the Probate Court ascertaining the amount due from the guardian, while generally conclusive upon the guardian and his sureties, like everything else

may be impeached for fraud: Seago v. People, 21 Ill. App. 283, 286.

² Knox v. Kearns, 73 Iowa, 286.

³ Kenner v. Caldwell, Bailey, Ch. 149.

⁴ Woodbury v. Hammond, 54 Me. 332, 340, affirmed in Tuxbury's Appeal, 67 Me. 267.

⁵ Hauser v. King, 76 Va. 731, 735.

⁶ Myers v. State, 45 Ind. 160; Corbaley v. State, 81 Ind. 62.

⁷ Hughart v. Spratt, 78 Ky. 313, 316.

him, that the guardian failed to charge her wards with boarding, tuition, or commissions, or that she made improper charges in their favor against herself.¹ The law is similarly held in Missouri, where the annual settlements of a guardian are not conclusive, but subject to review on final settlement, or, if there is no final settlement, then in a suit on the guardian's bond; and in such action the surety may avail himself of the right of the guardian to claim credit for board and maintenance of the ward, if not originally furnished as a bounty.²

In North Carolina, the statute making judgments against executors, administrators, and guardians conclusive evidence against their sureties³ was changed by statute of 1881, making them presumptive only as against the sureties, and allowing them to re-open the controversy and rebut the adjudication.⁴

Presumptive evidence by statute.

Periodical accounting, or settlements, are required of guardians in many States,⁵ which are not, as being *ex parte* statements only, requiring, indeed permitting, no adjudication, conclusive upon either the ward, the guardian, or his sureties, and must therefore be sharply distinguished from final accounting, or final settlements, which are passed upon and adjudicated by the court having jurisdiction, and necessarily constitute binding judgments as between the ward and guardian, and in many States, as shown above, conclusive also upon the sureties. Annual settlements constitute *prima facie* evidence against, but not in favor of, the party making them,⁶ and are admissible, as such, in favor of obligees on the bond, but not conclusive, in actions against the sureties.⁷ But sureties will not be heard to contradict the record of the court as to the validity of an act reported by the guardian.⁸

Periodical settlements not conclusive.

§ 46. **Judgments against Guardians' Sureties Directly.** — It is held, in a number of States, that an action at law cannot be brought on a guardian's bond against the sureties until the prin-

¹ State v. Hull, 53 Miss. 626, 647.

² State v. Miller, 44 Mo. App. 118, 123.

³ State v. Pike, 74 N. C. 531, 534; Badger v. Daniel, 79 N. C. 372, 386.

⁴ Moore v. Alexander, 96 N. C. 34.

⁵ As to these, see *post*, § 96.

⁶ State v. Roeper, 82 Mo. 57, 59.

⁷ State v. Engelke, 6 Mo. App. 356,

361; State v. Martin, 18 Mo. App. 468, 474; State v. Hoster, 61 Mo. 544; State v. Richardson, 29 Mo. App. 595, 601; Myers v. Myers, 98 Mo. 262, 268 (in this case the court hold annual settlements of executors and administrators admissible as *prima facie* evidence in their favor).

⁸ State v. Weaver, 92 Mo. 673, 680.

No judgment
against surety
before proceed-
ing against
principal.

Previous ac-
counting
necessary even
against
principal.

principal has been first called to account in some court of competent jurisdiction;¹ and this although he be dead, in which case it is the function of his personal representative to account.² The necessity of a previous accounting, before there can be an action at law for a recovery on the bond, is held to extend to suits against the principal himself, as well as the sureties;³ the ward can bring no action at law against his guardian so long as the relation of guardian and ward subsists.⁴

But it must not be understood that the obligees in a guardian's bond are deprived of all remedy against the sureties in case such accounting cannot be, or is not, had. In such case
Except by bill in equity. the obligees have an unquestioned right to file a petition in equity for an accounting,⁵ to which the sureties are proper, but not necessary, parties.⁶ Discussing the Iowa cases cited above, Shiras, J., says: "Despite the broad terms used, these decisions must be read in the light of the facts presented by the cases and the exact points, which it is apparent were taken into consideration by the court when passing on them. So read, these cases go to the extent of holding that upon the expiration of a guardianship, either by the ward becoming of age, or by the resignation or removal of a guardian, a suit against the sureties on the bond is prematurely brought, if commenced before the final accounting is had in the court having charge of the estate of the ward, for the reason that ordinarily it cannot be known what allowance for expenditures, and as compensation for services, will be made until the accounting is had; and hence it cannot be

¹ Ray v. Justices, 6 Ga. 303, 307; Justices v. Sloan, 7 Ga. 31, 35; Forrester v. Vason, 71 Ga. 49, 52; Salisbury v. Van Hoesen, 3 Hill (N. Y.), 77; Stilwell v. Mills, 19 Johns. 304; Newton v. Hammond, 38 Oh. St. 430, 435; Johnson v. Taylor, 1 Hawks, 271, relied on in Williams v. McNair, 98 N. C. 332, 334; Ordinary v. Heishon, 42 N. J. L. 15, 20; McFadden v. Hewett, 78 Me. 24 (authorizing an amendment of the petition to show that the interest of the persons suing had been specifically ascertained by probate decree); Anderson v. Maddox, 3 McCord, 237; see, also, Humphries v. Goss, 19 S. E. (S. C.) 1013.

² Connelly v. Weatherby, 33 Ark. 658,

662; Perkins v. Stimmel, 114 N. Y. 359, 365, 370; Salisbury v. Van Hoesen, 3 Hill (N. Y.), 77; Tudhope v. Potts, 91 Mich. 490; Sebastian v. Bryan, 21 Ark. 447, 450.

³ Kugler v. Prien, 62 Wis. 248; Critchett v. Hall, 56 N. H. 324; O'Brien v. Strang, 42 Iowa, 643, followed in Gillespie v. See, 72 Iowa, 345, 346; Bisbee v. Gleason, 21 Neb. 534, 538, relying on Ball v. La Clair, 17 Neb. 39; Vance v. Beattie, 35 Ark. 93, 95; Chapman v. Chapman, 32 Ala. 106.

⁴ Eiland v. Chandler, 8 Ala. 781, 783; Ely v. Hawkins, 15 Ind. 230.

⁵ Tudhope v. Potts, 91 Mich. 490.

⁶ Pace v. Pace, 19 Fla. 438, 454.

fairly said that the guardian is at fault in not paying over the money or property in his hands until the amount to be paid is thus ascertained.¹ From this it results that in order to support an action against the sureties on a guardian's bond, on the ground that he has converted the property of the ward to his own use and failed to account for it, it is not necessary to aver and prove that there has been a final settlement in the court which appointed him; nor that there has been a violation of any specific order made by the court;² the amount shown to be due by the guardian to the ward in his settlement with the Probate Court is sufficient to fix the liability of the surety and support an action against him, though there be no order of the court directing its payment to the party entitled to it.³ The order of court removing a guardian is, so far as to authorize action on the bond, equivalent to an order to pay over any money in his hands to his successor;⁴ and so the discharge of a surety by the Probate Court, who had, at the request of the ward after majority, made settlement for the deceased insolvent guardian, is a bar to any further action on the bond.⁵

Surety liable for amount due on last accounting.

Order removing equivalent to an order to pay.

So a bill for an account may in some States be brought on the guardian's death, removal, or other termination of the guardianship before majority of the ward, against his sureties on the bond, without making him or his administrator a party, on allegation of the guardian's insolvency,⁶ or even without such allegation;⁷ and so where the guardian has left the State.⁸ But it seems that in such case, if no new guardian be appointed to the minor, there can be no breach of the bond, and therefore no action thereon, before majority of the ward.⁹ So in Missouri, where the statute gives a summary remedy against sureties,

Suit against surety if guardianship determined before ward's majority.

Cumulative remedy.

¹ Robb v. Perry, 35 Fed. R. 102, 104.

² Robb v. Perry, *supra*; Smith v. Smithson, 48 Ark. 261, 262.

³ Smith v. Smithson, *supra*; Wann v. People, 57 Ill. 202, 208.

⁴ Finney v. State, 9 Mo. 227, 229.

⁵ Castetter v. State, 112 Ind. 445, 446.

⁶ Parker v. Irby, 9 Baxter, 221; Higgins v. State, 87 Ind. 282; Carpenter v. Soloman, 14 S. W. (Tex.) 1074; Frierson v. Travis, 39 Ala. 150, 155.

⁷ Foster v. Maxey, 6 Yerg. 224; Wolfe v. State, 59 Miss. 338.

⁸ Clement v. Ramsey, 4 S. W. (Ky.) 311; State v. Slevin, 93 Mo. 253, 260, citing, for authority, Commonwealth v. Wenrick, 8 Watts, 159, 162; Peele v. State, 118 Ind. 512, 516; to same effect: Governor v. Chouteau, 1 Mo. 731, 734; Farrington v. Secor, 60 N. W. (Iowa) 193.

⁹ Favorite v. Booher, 17 Oh. St. 548, 555.

whose principal has failed to respond to an order to pay, by *scire facias*, this remedy is cumulative, and does not exclude the ward's right to his action against the sureties without joining the guardian.¹ Such right of action may be given, by statute, without previous establishment of the *devastavit*;² and such a statute, as it affects only the rule of procedure, is applicable to bonds executed before its passage.³ It is held in some States that the obligees in a guardian's bond may proceed against the guardian and his sureties at once, without exhausting the guardian before pursuing the sureties.⁴ In Alabama (as in a number of other States), the statute makes bonds, by which two or more sureties are jointly bound, several as well as joint, so that suit may be brought, at law as well as in equity, against the principal and sureties, or any one or more of them;⁵ but independent of the statute it is held that although the general rule requires all the obligors and obligees of a joint bond to be made parties to a bill, yet an allegation of insolvency of joint obligors not made parties is a sufficient excuse for the omission to make them parties.⁶ In the absence of a statute, however, all the sureties are necessary parties in a chancery suit against the committee of a lunatic, principal in the bond, when relief is sought against the sureties, unless sufficient reason be shown for not doing so.⁷

Where there has been no previous final accounting and conclusive judgment, it is self-evidently necessary, in a suit brought on a guardian's bond against the sureties, to investigate all the transactions of the guardian with the estate of his ward, and in order to render judgment for the amount justly due, to allow the defendants to show, not only expenditures of the guardian for the benefit of the ward, but also any payments or advances made for his benefit by the sure-

¹ State v. Slevin, 93 Mo. 253, 258.

² People v. Brooks, 22 Ill. App. 594, 596; Bonham v. People, 102 Ill. 434, 439; McIntyre v. People, 103 Ill. 142, 148; Gebhard v. Smith, 29 Pac. 303; Bescher v. State, 63 Ind. 302, 317.

³ Winslow v. People, 117 Ill. 152, 158.

⁴ Barnes v. Trafton, 80 Va. 524, 534, citing Lacy v. Stamper, 27 Gratt. 42, 54, and Franklin v. Depriest, 13 Gratt. 257; Patty v. Williams, 71 Miss. 837, 842.

⁵ Fulgham v. Herstein, 77 Ala. 496, 499, citing Teague v. Corbitt, 57 Ala. 529, 537.

⁶ Fulgham v. Herstein, 77 Ala. 496, 498, relying on Watts v. Gayle, 20 Ala. 817, 824.

⁷ Hedrick v. Hopkins, 8 W. Va. 167, 171, referring to Hutcherson v. Pigg, 8 Gratt. 220.

ties.¹ On the same principle the sureties may intervene if the ward proceed by bill against the guardian alone, for the protection of their interests, although, as heretofore shown,² the sureties are concluded by the decree against the guardian whether they intervene or not;³ and appeal from a decree against the guardian on final settlement.⁴ And where all the parties in interest are before the court in a suit on the guardian's bond, the decree should direct the payment to be made out of the real and personal estate of the principal, before payment by the sureties;⁵ and judgment, in an action on the bond, should be for the penalty therein expressed, to be satisfied on payment of the damages found.⁶

Sureties may intervene in suit against guardian.

Property of guardian liable before surety's.

Creditors of a guardian, for necessities furnished at his request for the use of the ward, are held in Indiana to have such an interest in the ward's estate as to entitle them to an action on the guardian's bond for his misconduct in the management thereof; the guardian's report to the court having jurisdiction, that such creditor has a valid claim, is, in a suit against the guardian and his sureties, equivalent to a formal allowance.⁷

Creditors of guardian for necessities to the ward have an action on the bond.

Summary remedy is given by statute in some of the States against sureties on guardians' bonds. In Alabama, execution may issue against the sureties, if execution against the principal, under a judgment against him, has been returned unsatisfied, generally or in part;⁸ so, in Missouri, the sureties may be prosecuted, after a return *nulla bona* of the execution against the principal, by *scire facias*.⁹ In such proceedings the sureties will not be heard to assail the validity of the judgment as to any matter which was, or might have been, urged in defence thereto in the original proceeding against the guardian; but they may litigate the question of

Summary statutory remedies.

¹ Davenport v. Olmstead, 43 Conn. 67, 76.

² Ante, § 45.

³ Hailey v. Boyd, 64 Ala. 399, 401; Woome's Appeal, alias Spath's Estate, 144 Pa. St. 383, 392.

⁴ Farrar v. Parker, 3 Allen, 556, and earlier cases cited.

⁵ Patton v. Patton, 3 B. Mon. 160; Hendry v. Clardy, 8 Fla. 77, 82.

⁶ Anthony v. Estes, 101 N. C. 541

⁷ State v. Fitch, 113 Ind. 478, 482, citing i. a., Moody v. State, 84 Ind. 433, which holds that the capacity to sue on a guardian's bond is not in issue unless specially denied.

⁸ Treadwell v. Burden, 8 Ala. 660, 663.

⁹ Rev. St. 1889, § 5331.

suretyship, and show in defence any matter subsequent to the rendition of the judgment.¹

Sureties having satisfied the claims of obligees on a guardian's bond are subrogated to the rights of the latter,² and may enforce

Sureties subro-
gated to rights
of obligees.

whatever remedies they may have had, to reimburse themselves,³ subject, of course, to all the equities, for they can have no higher rights than those to which they are thus subrogated.⁴ The subrogation may, to avoid circuitry of action, be enforced before the surety has discharged the principal's debt;⁵ and in a suit by the surety who had paid his principal's liability against the guardian, the wards, although they are also the heirs of the guardian, will not be heard to assert that the surety was not liable until after an accounting by the guardian.⁶

Except under statutory provision, where special remedies are given against sureties, it is not necessary that the ward should

Demand not
necessary to
make surety
liable.

make demand of payment from the guardian, or give notice of such demand to the sureties, before maintaining an action on the guardian's bond;⁷ but for the recovery of a special penalty based upon a conversion by the guardian there must be at least a demand and a refusal to pay.⁸

The surety cannot in an action against him for the breach of the guardian's bond, claim application of payments made by the guardian to the ward before the breach, in mitigation of a liability arising to the surety by reason thereof. The bond is collateral to the entire administration of the ward's estate, and covers the refusal to pay the last, as well as the first dollar due to the ward, and where the bond is given for the protection of several minors, it is broken by the refusal to pay the last of them arriving at majority.⁹

Voluntary grantees of a deceased surety may be joined as de-

¹ Gravett v. Malone, 54 Ala. 19, 21; Chaney v. Thweatt, 91 Ala. 329.

² Rapp v. Masten, 4 Redf. 76, 79, citing New York cases in support of the general proposition; Harris v. Harrison, 78 N. C. 202, 220; Thompson v. Humphrey, 83 N. C. 416; Sanders v. Forgasson, 3 Baxt. 249, 252 (including his right to compensation).

³ Fogarty v. Ream, 100 Ill. 366, 379; Gilbert v. Neely, 35 Ark. 24, 28; Rice v. Rice, 108 Ill. 199, 204.

⁴ Adams v. Gleaves, 10 Lea, 367, 376.

⁵ Adams v. Gleaves, *supra*; State v. Atkins, 53 Ark. 303, 305.

⁶ Richardson v. Day, 20 S. C. 412, 416.

⁷ See *ante*, § 42; also People v. Borders, 31 Ill. App. 426, 431; Buchanan v. State, 106 Ind. 251, 255, citing earlier Indiana cases.

⁸ Buchanan v. State, *supra*.

⁹ Brown v. Roberts, 14 La. An. 259.

fendants in a chancery suit by wards on the bond of their former guardian, in order to subject the property voluntarily conveyed to their demand.¹

The subject of a guardian's liability to account is treated in a later chapter.²

¹ *Patty v. Williams*, 71 Miss. 837 ; ² *Post*, § 94 *et seq.*
Ellis v. McGee, 63 Miss. 168.

TITLE SECOND.

OF THE FUNCTIONS OF GUARDIANS.

CHAPTER VI.

OF THE NATURE AND EXTENT OF THE GUARDIAN'S RIGHTS AND DUTIES IN RESPECT OF HIS WARD'S PERSON.

§ 47. **Guardian's Right to Custody of his Ward.** — The nature of the authority of guardians over the persons and estates of minors has been discussed in the chapter treating of the several kinds of guardians to minors;¹ the distinction is there pointed out between the authority of guardians over the person and over the estates of their wards, as recognized in the Roman, French, English, and American law. It is there also shown, that under all of these codes the parents are treated as the natural guardians of the persons of their children, and that, under American statutes at least, no other guardian of the person of a minor can be appointed during the lifetime of the parents, unless these be declared incompetent by judicial decree.² Hence, the guardian, lawfully appointed, of the person of a ward stands *in loco parentis*, and is entitled to the custody of the ward, even against the parent,³ and *a fortiori* against any other relative or a stranger;⁴ and this notwithstanding that the parent may have given the custody to such relative or stranger,⁵ if the gift was otherwise than by deed or devise valid as a testamentary appointment.⁶

Guardian has custody of the ward.

¹ *Ante*, ch. iii.

² *Ante*, § 19.

³ *Macready v. Wilcox*, 33 Conn. 321, 327; *Fitts v. Fitts*, 21 Tex. 511; *Johns v. Emmert*, 62 Ind. 533; *Alston v. Foster*, Freem. Ch. 732; *Van Houten, in re*, 3 N. J. Eq. 220, 226.

⁴ *Bonnell v. Berrybill*, 2 Ind. 613;

Matthews v. Wade, 2 W. Va. 464; *McDowell v. Bonner*, 62 Miss. 278; *Burger v. Frakes*, 67 Iowa, 460; *Commonwealth v. Dugan*, 2 Pa. Dist. R. 772.

⁵ *Coltman v. Hall*, 31 Me. 196; *Jenkins v. Clark*, 71 Iowa, 552, 555.

⁶ As to which see *ante*, § 20.

The custody of the ward's person by his guardian cannot be regarded as illegal, and his refusal to surrender possession of such ward, even to the parents, does not constitute unlawful imprisonment or restraint.¹ But, like the authority of the parents, the legal right of the guardian to the custody of his ward's person must yield to the paramount consideration of the child's obvious interest;² and considerations affecting the health and welfare of a child may justify a court in withholding its custody temporarily even from its legal guardian; and such discretion is not reviewable, except for manifest error or abuse of discretion made to appear.³ For the like reason it is held, in most States,⁴ that testamentary guardians are not entitled to the custody of children having a mother living who has not been judicially declared incompetent.⁵ And courts may, if circumstances should make it desirable and conducive to the well being of the child, direct that a mother or other relative shall have access to a child whose custody is decreed to a guardian.⁶

Custody of guardian never illegal,

but must yield to the child's interest.

comfort or

Right of access to ward by relatives.

The guardian, standing *in loco parentis*, has no more right to bind out his ward *as a servant*, than a father has; and a parent cannot transfer the personal service of his child to another, and thereby make him such other's servant.⁷ By the statute of Elizabeth,⁸ provision is made for the terms and conditions under which apprentices may be bound out to serve in husbandry or according to the custom of London, in any art, mystery, or manual occupation, or to be instructed in any of the mysteries or crafts of merchants, &c.; and statutes exist in probably all of the States regulating the matter of binding out apprentices. Thus, a guardian may bind out his ward to learn a trade, just as the father might.⁹

Guardian has no more right than a father, to bind his ward as a servant;

but otherwise as to apprenticing.

¹ *Townsend v. Kendall*, 4 Minn. 412, 421; *People v. Wilcox*, 22 Barb. 178, 189.

² *Ward v. Roper*, 7 Humph. 111; *Hill v. Hill*, 49 Md. 450, 457; *Heather Children, in re*, 50 Mich. 261.

³ *Matter of Welch*, 74 N. Y. 299, 301; *People v. Walts*, 122 N. Y. 238, 241.

⁴ As to exceptions see *ante*, § 20.

⁵ *Lord v. Hough*, 37 Cal. 657, 666; *Ramsay v. Ramsay*, 20 Wis. 507.

⁶ *Ralston, ex parte*, 1 R. M. Charl. 119; *Hill v. Hill*, 49 Md. 450, 458.

⁷ *Respublica v. Keppel*, 1 Yeates, 233.

⁸ 5 Eliz. ch. 4, §§ 25 *et seq.*

⁹ *Denison v. Cornwell*, 17 Serg. & R. 374, 377.

In a Georgia case, decided in 1856, the court take occasion to express distrust in the efficiency of the system of apprenticing boys as a means of education. "It may do

The theory underlying most of these statutes is, that the contract is made by the apprentice, to which the father or guardian merely assents; and when so assented to by a guardian, he does not thereby make himself liable to the master for a breach of contract by the apprentice.¹

The guardian's right to change his ward's domicil has been considered elsewhere.²

§ 48. **Guardian's Right to the Services of his Ward.** — Guardians, though standing *in loco parentis* to their wards, are not entitled to the personal services of these. Wages that a minor may have earned for work done for his guardian, constitute a trust fund which the guardian is bound to administer and account for to the ward when of age,³ the conversion of which to the guardian's own use is held to constitute a wilful neglect.⁴ But minors who are kept occupied by their tutor to teach them habits of industry and prevent them from growing up in idleness, cannot expect compensation of the tutor.⁵

To permit a ward to retain the wages paid him for his work, and to spend it in the support of himself and his orphan brother and sister, has been held no breach of a guardian's duty, as it might have been if the guardian had allowed the wages to be spent for vicious and immoral purposes.⁶

Where a ward is of such age as to be capable of earning his board and clothing, and renders services in the employment of his guardian, the compensation to which the ward is entitled should at least set-off any charge for boarding and clothing;⁷ and if, in accounting, the ward

very well," says Lumpkin, J., "to talk about apprenticing 'Young America.' It is a fallacy and an impossibility, as everybody knows. The first thing heard of the boy, he is in California. Better spend what little they have in qualifying them to become the founders of States, than attempt to convert them into honest artisans and mechanics:" *Rolf v. Rolf*, 20 Ga. 325, 328.

¹ *Veldé v. Levering*, 2 Rawle, 269; *Chapman v. Crane*, 20 Me. 172.

² *Ante*, § 27.

³ *Bannister v. Bannister*, 44 Vt. 624, holding the guardian liable, though the wages had been paid to the ward, who paid them over to his father in pursuance

of a contract with him whereby the minor had bought his time for a stipulated sum; *Bass v. Cook*, 4 Port. 390.

⁴ Under the statute of Vermont, which subjects the person found guilty of such conversion to imprisonment: *Haskell v. Jewell*, 59 Vt. 91.

⁵ *Tutorship of Hollingsworth*, 45 La. An. 134, 143; *Hebert v. Hebert*, Manning's Unreported Cases, 214.

⁶ *Shurtleff v. Rile*, 140 Mass. 213, 215.

⁷ *Foteaux v. Lepage*, 6 Iowa, 123, 131 *et seq.*; *Re Clark*, 36 Hun, 301; *Hayden v. Stone*, 1 Duv. 396, 400; *Meyer v. Temme*, 72 Ill. 574, 577; *Marquess v. La Baw*, 82 Ind. 550.

objects to the amount allowed for such services as insufficient, the burden of proof is on the ward.¹ The same rule holds, of course, where the guardian commits the custody and control of his ward to one who compels her to render personal service, while her education and culture are neglected; the guardian will not be allowed credit, in such case for board within the value of her services.² On the same principle of justice, a ward will be entitled to no compensation for her services if she lives in the family of the guardian and receives from him nurture, care, and instruction.³

The parent is entitled to an action for the seduction of his infant daughter, on the common law theory of compensation for the loss of her services. In Pennsylvania, it has been held that since the guardian of the person of a minor stands *in loco parentis*, the reciprocal power and duty of a guardian and minor are, for the time being, the same as those of a father and child, and the guardian has the same right to maintain an action for the seduction of his female ward as the father would have.⁴ The same principle is announced in Illinois⁵ and New York,⁶ although based, partly, on the right of compensation for services during the girl's confinement.

In some States guardian has action for seduction of his ward.

The doctrine, that the guardian comes *in loco parentis* to his

¹ Calhoun v. Calhoun, 41 Ala. 369, 374; Kinsey v. State, 71 Ind. 32, 37 (holding, however, that the claim for services rendered by the ward cannot be set-off to a claim by the guardian for board, nursing, clothing, and tuition, set up by such guardian in answer to an action by the ward on a special bond, without showing that the general bond has been exhausted).

² Starling v. Balkum, 47 Ala. 314, 316.

³ Moyer v. Fletcher, 56 Mich. 508, 514.

⁴ Fernsler v. Moyer, 3 Watts & S. 416. The court render this decision in full recognition of the doctrine that the guardian is not liable to support the minor out of his own estate, as the father is, and is not, therefore, entitled to her services (whereby, it might seem, the frail foundation for this action existing at common law in favor of the father is taken away from the guardian). The court argue that at common law the guardian could recover damages for his ward in trespass, citing 3 Bac.

Abr. 414, as authority; and have, by statute 2 Westm. ch. 3, § 35, a writ of ravishment of ward for the recovery of the body as well as damages; and that by the equity of the statute a guardian in socage or testamentary guardian, has this remedy. Schouler, in his work on Domestic Relations, says that "the equity of this statute may, perhaps, extend to testamentary, chancery, and probate guardians as well as to guardians in socage," and ascribes this as the principle upon which the above case was decided: Schoul. Dom. Rel. § 336, p. 496.

⁵ Ball v. Bruce, 21 Ill. 161, in which Walker, J., says: "The action on the case for seduction may be maintained by the parent, guardian, master, or other person standing *in loco parentis*, for debauching the daughter, ward, or servant."

⁶ Certwell v. Hoyt, 6 Hun, 575; Ingersoll v. Jones, 5 Barb. 661, 664. To similar effect: Bracy v. Kibbe, 31 Barb. 273.

ward has been relied on to deprive a ward, on coming of age, of an action in *assumpsit* against the guardian for work and labor done for him during minority. Questions arising between the

Right to compensation and liability for maintenance triable in Probate Court.

guardian and ward, such as the right to charge for board, clothing, &c., while the ward worked for the guardian, or of the ward's right to compensation for services rendered to the guardian, must be decided in the Probate Court.¹

§ 49. **Guardian's Duty in Respect of the Education and Maintenance of his Ward.** — It is the duty of guardians standing *in loco parentis* to provide for the education of their wards. If the ward

Ward should earn his living if able, and of small fortune.

be of limited fortune, and able to earn his support, it is the guardian's duty to see that he does so, rather than to permit him to remain in idleness, or to expend his limited patrimony.² But if the ward is

physically unable to earn his support, or cannot do it without encroaching upon the time necessary to acquire a good education, the guardian may use the property of the ward for his support and education.³ The guardian's discretion in respect of the quality

of boarding and the extent of schooling that ought to be allowed to his ward, is on a similar footing with that of a parent; he is not compellable to prefer mere economy of cost to the welfare and comfort of his ward.⁴

The father,⁵ or, if she has an ample fortune,⁶ the mother, but not, of course, in the absence of statutory provision, the stepfather,⁷ nor any relative other than a parent, is

No one but the father, or person *in loco parentis*, liable for minor's support.

liable, legally, for the education and maintenance of a minor, unless such person has voluntarily placed himself *in loco parentis* to him or her.⁸ This is equally true of the guardian of the person.⁹ Thus a guardian

may conclude himself by a promise not to demand compensation for the tuition, board, clothing, and maintenance of his

¹ *Denison v. Cornwell*, 17 Serg. & R. 374, 377.

² *Brown v. Yaryan*, 74 Ind. 305, 310; *Clark v. Clark*, 8 Paige, 152; *Anderson v. Thompson*, 11 Leigh, 439, 459; *Chaplin v. Simmons*, 7 T. B. Mon. 337, 341.

³ *State v. Clark*, 16 Ind. 97.

⁴ *Gott v. Culp*, 45 Mich. 265, 271.

⁵ *Burke v. Turner*, 85 N. C. 500, 504; *Hanford v. Prouty*, 133 Ill. 339, 354.

⁶ *Wilkes v. Rogers*, 6 Johns. 566, 586; *Alling v. Alling*, 52 N. J. Eq. 92.

⁷ *Besondy, in re*, 32 Minn. 385, 387; *Cole v. Eaton*, 8 Cush. 587.

⁸ As to the liability of parents and others to support and educate minors, see *ante*, §§ 9, 13.

⁹ *Spring v. Woodworth*, 4 Allen, 326.

ward,¹ if such promise is not void for want of consideration,² or as a mere expression of present intention;³ and where the services of a female ward are worth as much as her board,⁴ or the ward is brought up as one of the family without apparent claim or expectation of allowance from her estate, the guardian will not be allowed credit for the payment of a subsequent claim therefor;⁵ no claim can be allowed for that which was originally intended as a bounty.⁶ But where a ward leaves the family of his guardian just when his services might become valuable, thereby depriving the guardian of the parents' right to the services of a child during minority, compensation should be allowed the guardian for the ward's maintenance during the time he was unable to earn his living.⁷ Neither the circumstance that a ward is the guardian's niece, nor that another member of the family offered to board her for nothing, should militate against the guardian's right to charge for her board and clothing.⁸ Since it is a father's duty, whether he be guardian or not, to educate and support his child out of his own means, a guardian cannot, of course, be allowed credit in his accounting to the ward, for expenses of education and maintenance, unless the ward had no parents willing or able to provide therefor,⁹ or a court of competent jurisdiction has ordered such expenditure.¹⁰ And the same is true, where the ward is supported by a brother; if the brother demands no compensation for the maintenance, the guardian cannot charge his ward's estate by voluntary payment to the brother.¹¹ Nor will creditors be allowed to compel their

But a guardian may bind himself for a ward's support.

Child treated as one of the family cannot be subsequently charged for support,

unless he leave the family just when capable of rendering service.,..

Support is not chargeable against a ward who has a parent competent to support him.

¹ *State v. Baker*, 8 Md. 44, 49; *Hooper v. Royster*, 1 Munf. 119, 130; *Bradford v. Bodfish*, 39 Iowa, 681, 684; *Snover v. Prall*, 38 N. J. Eq. 207.

² *Keith v. Miles*, 39 Miss. 442; *Cunningham v. Pool*, 9 Ala. 615, 621; *Hooper v. Royster*, *supra*; *Armstrong v. Walkup*, 9 Gratt. 372, 375.

³ *Alsop v. Barbee*, 14 B. Mon. 522, 525.

⁴ *Hayden v. Stone*, 1 Duval, 396.

⁵ *Folger v. Heidel*, 60 Mo. 284; *Webster v. Wadsworth*, 44 Ind. 283; *Crosby v. Crosby*, 1 S. C. 337, 347; *Douglas' Ap-*

peal, 82 Pa. St. 169, 173; *Horton's Appeal*, 94 Pa. St. 62.

⁶ *Chapline v. Moore*, 7 T. B. Mon. 150, 163.

⁷ *Pratt v. Baker*, 56 Vt. 70, 77.

⁸ *Moyer v. Fletcher*, 56 Mich. 508, 513; to same effect: *Latham v. Meyers*, 57 Iowa, 519, 520.

⁹ *State v. Roche*, 94 Ind. 372, 378; s. c. 91 Ind. 406.

¹⁰ As to which see *post*, § 50; also § 51 and § 104.

¹¹ *Eschrich, in re*, 85 Cal. 98, 100.

debtor to charge her children out of their estates for their support and maintenance, whether such duty, on the death of her husband, devolves on her as a matter of law or not.¹

The legal duty of a guardian to educate and maintain his ward extends no further than to judiciously apply the estate of the latter for that purpose. He should know the amount and situation of the estate, and is not obliged to incur any liability beyond it.² He is not

Duty to educate a ward limited to the ward's means.

liable for any contract of his ward in the absence of an express undertaking in writing to that effect, precisely as if the ward were any stranger; nor, either personally or in his fiduciary character, for necessities furnished the ward without his consent, either express or implied.³ And if he contracts with a third person for the education and support of his ward, he may, perhaps, make himself liable

Ward cannot bind his guardian by his own contract.

Though liable on his contract himself, guardian is entitled to reimbursement out of ward's estate.

personally, at law, to such third person, but in equity such personal liability of the guardian will not relieve the ward's estate, nor is the guardian liable personally, unless he consented to be so bound.⁴ But if he place the ward in custody of a third person, this implies authority on part of such third person to employ for the ward a physician, if necessary, and a promise by the guardian to pay his services out of the ward's estate.⁵ That the funds in

Pension money liable for ward's support.

a guardian's hands came from the government in the shape of a pension to the minor child of a deceased soldier does not relieve the ward's estate from liability.⁶

Neither can the guardian bind his ward, either as to the person or the estate, by any contract; but contracts entered into by the guardian, in performance of his duty to educate and maintain his ward, bind him personally and alone,⁷ save that the ward's estate is liable to reimburse him for reasonable expenditures made for his benefit.⁸ It

Guardian's contract binds him alone.

¹ *Hanford v. Prouty*, 133 Ill. 339, 354.

² *Hutchinson v. Hutchinson*, 19 Vt. 437, 441; *McDaniel v. Mann*, 25 Tex. 101; *Ford v. Miller*, 18 La. An. 571.

³ *Overton v. Beavers*, 19 Ark. 623, 626 *et seq.*; *Gwaltney v. Cannon*, 31 Ind. 227; *Tucker v. McKee*, 1 Bailey, 344; *Turner v. Flagg*, 6 Ind. App. 563, reviewing numerous cases.

⁴ *Barnum v. Frost*, 17 Gratt. 398, 405.

⁵ *Walker v. Browne*, 3 Bush, 686; but the guardian is liable only out of the ward's estate: *Cole v. Eaton*, 8 Cush. 587.

⁶ *Welch v. Burris*, 29 Iowa, 186; *Brown's Appeal*, 112 Pa. St. 18, 24.

⁷ *Lindsey v. Stevens*, 5 Dana, 104, 107.

⁸ *Reading v. Wilson*, 38 N. J. Eq. 446,

is, as a general rule, for the guardian to judge what are necessities according to the ward's estate and condition in life, and he has the same authority, in this respect, as a parent,¹ of which those who supply the ward with necessities must take notice at their peril.² "To determine that a stranger may recover the price of goods furnished to a ward against the injunctions of the guardian would be to uproot the foundations of society."³

Guardian judges what is necessary.

In the protection of his ward's morality, the guardian has the right to forbid a person of bad character for honesty and chastity, whom he regards as an improper inmate in the house of his ward, to enter the same, and if there, to require her to depart; and if she refuse, to put her out and keep her out, using no more force, and removing her no further, than is necessary to effect this object.⁴

§ 50. **Distinction between Capital and Income in defraying the Expenses of Education and Maintenance.** — The strict English rule, followed extensively in the United States, limits guardians to the use of the ward's income for his education and support, unless the proper court sanction expenditure in excess thereof.⁵ Not strictly to the income of any current year; but the unexpended surplus of previous years may be applied, if thereby the expenditures during the entire minority of the ward shall not exceed the income for said period.⁶ Nor are the expenses limited to the revenue from the estate in the guardian's hands, but may reach the entire income from the whole of the ward's property, wherever situated.⁷ The increase of slaves is not reckoned as income;⁸ nor, *a fortiori*, the proceeds of sale of

Costs of education limited to ward's income,

from whatever source.

Slaves and proceeds of sale of the corpus not income.

449; *Rollins v. Marsh*, 128 Mass. 116, 118. See, as to the power of a guardian to bind his ward by contract, *post*, § 57.

¹ *Nicholson v. Spencer*, 11 Ga. 607, 610; *Kraker v. Bryan*, 13 Rich. 163, 170.

² *McKanna v. Merry*, 61 Ill. 177; *State v. Cook*, 12 Ired. 67; *Hussey v. Roundtree*, 1 Busb. 110, 112.

³ *Bredin v. Dwen*, 2 Watts, 95, 102.

⁴ *Wood v. Gale*, 10 N. H. 247.

⁵ *Myers v. Wade*, 6 Rand. 444; *Whitledge v. Callis*, 2 J. J. Marsh. 403; *Villard v. Chovin*, 2 Strobb. Eq. 40; *Beeler v. Dunn*, 3 Head, 87, 90; *Oakley v. Oakley*,

3 Dem. 140; *Payne v. Scott*, 14 La. An. 760; *McDowell v. Caldwell*, 2 McCord Ch. 43, 58; *Boyd v. Hawkins*, 60 Miss. 277, 281; *Brown v. Grant*, 29 W. Va. 117; *Johnston v. Haynes*, 68 N. C. 514; *Phillips v. Davis*, 2 Sneed, 520, 525; *Bellamy v. Thornton*, 103 Ala. 404, 408.

⁶ *Speer v. Tinsley*, 55 Ga. 89, 92; *Bybee v. Tharp*, 4 B. Mon. 313, 320; *Gott v. Culp*, 45 Mich. 265, 273; *Long v. Norcum*, 2 Ired. Eq. 354, 357.

⁷ *Foreman v. Murray*, 7 Leigh, 412, 418.

⁸ *Anderson v. Thompson*, 11 Leigh, 439.

the ward's real estate.¹ There can be no order for the sale of the ward's real estate to reimburse a guardian for the excess of expenditures for the ward's education and support over his income, much less can he retain the ward's property for that purpose.² It is, therefore, error to set aside a decree rendered on a bill of review of final settlement, in which the guardian was refused credit for expenditures exceeding the ward's income, on the ground that the bill was demurrable.³

Authority to break in upon the ward's capital may be obtained from courts having jurisdiction over guardians, for the purpose

of support and education, in cases where, from the want of sufficient capital, the income is inadequate for such purpose;⁴ but application should be made before the expenditure is incurred.⁵ Such an order must be entered of record in the minutes of the court; it cannot be es-

tablished by a memorandum of the judge written on some paper relating to the guardianship,⁶ nor by a mere verbal direction;⁷ and when properly made, is binding, in so far, at least, as to establish *prima facie* the right of the guardian to have credit for expenditures pursuant thereto, allowed.⁸

The court rarely permits, by its own order, a reduction of the capital; "the circumstances," says Chief Justice Bibb, in delivering the opinion of the Court of Appeals of Kentucky in the case of Chapline and Moore,⁹ "must be cogent and extraordinary to induce the court to assent to break in upon the capital; . . . for the mere purpose of maintenance of a child in health and infancy, a court of equity will not permit a sinking of the capital."¹⁰

The rigidity of the rule, requiring the sanction of a court in advance for any disbursement in excess of the ward's income, has induced courts in many of

But see, to the contrary, *Long v. Norcum*, 2 Ired. Eq. 354, 359.

¹ *Irvine v. McDowell*, 4 Dana, 629; *Strong v. Moe*, 8 Allen, 125; *Rinker v. Streit*, 33 Gratt. 663, 672; *St. Joseph's Academy v. Augustini*, 55 Ala. 493.

² *Davis v. Roberts*, 1 Sm. & M. Ch. 543, 553.

³ *Wiggle v. Owen*, 45 Miss. 691.

⁴ *Bostwick, in re*, 4 Johns. Ch. 100; *Hart v. Czapski*, 11 Lea, 151, 153; *Withers v. Hickman*, 6 B. Mon. 292, 294.

⁵ In some of the States the court has no power to allow credit for disbursements

in excess of the income, no matter how necessary they may have been, in any settlement or accounting, unless there had been an express order in advance: *Austin v. Lamar*, 23 Miss. 189, 192; *Whitehead v. Bradley*, 87 Va. 676, 680; citing earlier Virginia cases.

⁶ *Gilbert v. McEachen*, 38 Miss. 469, 472.

⁷ *Jones v. Parker*, 67 Tex. 76, 82.

⁸ *Latham v. Myers*, 57 Iowa, 519, 521.

⁹ 7 T. B. Mon. 150, 170.

¹⁰ To similar effect: *Davis v. Harkness*, 6 Ill. 173, 178.

the United States to modify it. "There are many cases," says East, Sp. J., delivering the opinion in *Hobbs v. Harlan*,¹ "and of frequent occurrence, in which great and gross injustice would be done to the parties most concerned, were it the rule," in cases "such as a personal injury to the ward involving the services of a surgeon; sickness of a protracted character, requiring expensive nursing and medical bills; death of the ward, requiring expenses for decent interment; marriage of a female ward; besides a large number of social and moral emergencies necessitating instant action on the part of the guardian, involving pecuniary obligation." The rule, then, may be stated to be, in such States, that "expenditures in excess of the income will not be allowed, unless good reason is shown to the court, why the court was not applied to in advance."² It is held, accordingly, that where a guardian, having no funds of his ward in his hands, and no certainty of ever obtaining any, advances his own means in the support of his ward, it would be unreasonable to demand that he should incur the expense of procuring an order of court directing him to expend his money for the support of the ward.³ So a guardian was allowed credit for expenses in support of a ward exceeding the income, without a previous order, if made upon "urgent necessity," or "such as could not have been foreseen or provided for;"⁴ where the emergency was great, "and the expediency manifest;"⁵ "when the expenditures were demanded by such circumstances, amounting, indeed, to physical necessity, as would have compelled any court to authorize them without a moment's hesitation;"⁶ "under an emergency . . . as if there be a dearth, and a consequent failure of crops."⁷ Payment of a fine to which the ward was sentenced is held to be the guardian's duty without awaiting an order of court.⁸ Money paid out for a watch is sanctioned, if it be found that a watch was necessary or proper for the ward.⁹ Spending money may properly be allowed to a young lady, whose actual neces-

to avoid injustice in peculiar cases.

Duty to pay ward's fine.

¹ 10 Lea, 268, 275.

² *Hobbs v. Harlan*, *supra*; *Cohen v. Shyer*, 1 Tenn. Ch. 192, 194, and cases cited; *Downey v. Bullock*, 7 Ired. Eq. 102, 110.

³ *Cummins v. Cummins*, 29 Ill. 452. And see *Long v. Norcum*, 2 Ired. Eq. 354, 358; *Smith v. Bixby*, 5 Redf. 196; *Roseborough v. Roseborough*, 3 Baxt. 314.

⁴ *Hobbs v. Harlan*, *supra*.

⁵ *Prince v. Logan*, 1 Speers (S. C), 29, 33.

⁶ *Johnston v. Coleman*, 3 Jones Eq. 290, 293.

⁷ *Downey v. Bullock*, 7 Ired. Eq. 102, 110.

⁸ *Jones v. Parker*, 67 Tex. 76, 82.

⁹ *Jones v. Parker*, *supra*.

series of life in the matter of boarding, clothing, and schooling are gratuitously furnished by her relatives.¹ In Mississippi it is held, that "it is only in very special cases, such as could not have been foreseen, that the court ought, under any circumstances, to sanction a charge of this kind not previously ordered by the court."² Expenditures in excess of a ward's income are sanctioned, sometimes, in conformity with an equitable rule, according to which that is to be sanctioned which, according to the facts proved, would have been ordered to be done if application had been made for such an order.³

It is held, therefore, that in order to obtain allowance for expenditures in excess of the income, the guardian must show such a state of facts as would, if shown to exist, have justified the court in making an order to that effect.⁴ The power to sanction such expenditures is held to be "one of the most delicate and responsible duties which devolves upon a court of chancery," and is in some States denied to probate courts.⁵

Provision is made by statute, in some of the States, authorizing guardians to use the principal of their wards' estates for their comfortable maintenance, if the income and profits thereof are insufficient for that purpose.⁶

A third person of whom the guardian purchases, is not bound to see that payment is made from the ward's income, although the guardian has no right to expend the principal of his ward's estate.⁷ And so if the guardian pays money from the principal of his ward's estate to a suitable person for the ward's support, and the money is reasonably expended, he cannot recover back the amount from such person.⁸

¹ *Karney v. Vale*, 56 Ind. 542.

² *Frelick v. Turner*, 26 Miss. 393, 394.

³ *Jarrett v. Andrews*, 7 Bush, 311, 314; *Calhoun v. Calhoun*, 41 Ala. 369, 374; *Browne v. Bedford*, 4 Dem. 304, 311; *Hyland v. Baxter*, 98 N. Y. 610, 615; *Tudhope v. Avery*, 63 N. W. (Mich.) 979; *Jackson v. Rose*, 30 S. W. (Ky.) 16.

⁴ *Osborne v. Van Horn*, 2 Fla. 360, 365; *Owens v. Pearce*, 10 Lea, 45; *Beeler v. Dunn*, 3 Head, 87, 91; *Barton v. Bowen*, 27 Gratt. 849, 855. In West Virginia,

however, the power of a court to sanction expenditures in excess of the income, made without previous order, is taken away by statute: *Brown v. Grant*, 29 W. Va. 117.

⁵ *Mitchell v. Webb*, 2 Lea, 150, 152.

⁶ *Preble v. Longfellow*, 48 Me. 279; *Campbell v. Golden*, 79 Ky. 544, 547; *Chubb v. Bradley*, 58 Mich. 268, 271, referring to *Gott v. Culp*, 45 Mich. 265. But see *Brown v. Grant*, *supra*.

⁷ *Broadus v. Rassen*, 3 Leigh, 12, 25.

⁸ *Chubb v. Bradley*, 58 Mich. 268.

§ 51. **Policy of the Law as to the Extent of Expenditures for the Ward.**—It results from the preceding section, that courts are disposed to watch jealously the interest of wards in passing upon the transactions for which guardians take credit in their accounting with the ward. One of the well-settled principles of courts of chancery, applicable alike to probate courts having jurisdiction over guardians, is that no maintenance shall be allowed out of an infant's estate, unless it be for the infant's benefit to make such order. Hence, courts will not allow the estate of infants to be charged with the expense of their maintenance, who have a father of sufficient ability to maintain them and bring them up out of his own means. In determining this question, reference should be had to the situation and prospect in life of the children, and the amount of their fortunes, as well as the situation, ability, and circumstances of the father, having due regard to the claims of others upon his bounty.¹ Courts endeavor to promote the permanent interest, welfare, and happiness of the children who come under their care, which are not always best secured by rigid economy, regardless of the habits and associations of their period of minority.² It is a wise policy that should be judicially encouraged to anticipate (when necessary) a part of the wealth of an infant to secure a good education, "so amply remunerated," says the Chancellor, in *Wilkes v. Rogers*, "by the value it stamps upon the remainder."³ If the parent be also the guardian of a minor having an estate of its own, the circumstances of the parent, as well as the amount of the estate of the ward may be taken into consideration in fixing the amount allowable, if any, out of the ward's estate.⁴ It is well settled that courts of equity, though fully recognizing the common law obligation of a father to support and educate his children, and generally refusing to assist him from their private estates, will, when he is without means, or without adequate means, to educate them according to their future expectations, interpose

Courts restrict expenditures for ward to such as are beneficial.

Rigid economy not always wise or beneficial.

Circumstances of parent and ward should be considered.

Courts make allowance to father for support, when necessary.

¹ *Kane, in re*, 2 Barb. Ch. 375; *Beardsley v. Hotchkiss*, 96 N. Y. 201, 219.

² *Burke, in re*, 4 Sandf. Ch. 617, 619, holding that a father having a moderate income might be allowed \$2,500 a year for the support and education of his two

daughters, whose joint income was between \$3,500 and \$4,000.

³ 6 Johns. 566, 577.

⁴ *Voessing v. Voessing*, 4 Redf. 360, 364; *Alling v. Alling*, 52 N. J. Eq. 92.

and make an allowance out of the children's estate for that purpose;¹ and on this ground it is the duty of a guardian to provide for the support, maintenance, and education of his ward out of the ward's estate, although he have a father living, if the father be poor and unable to furnish such support.² A guardian, though father of the ward, having contracted a debt for the maintenance and education of his ward, is held to be entitled to credit therefor in an action on his bond, although the same has been released by the creditor, and he has never paid it.³ *Prima facie*

the father has no right to charge his children for their support and maintenance; if, therefore, the father, being guardian, have not made such charge, an answer by his surety, by way of set-off in an action on the

Prima facie
father has no
right to charge
his child.

bond, that the children are indebted to the guardian for board, clothing, and maintenance, without alleging the facts out of which the indebtedness arises, is bad on demurrer.⁴ Nor is it sufficient to charge that the father was poor, or in indigent circumstances,

Father's surety
cannot demand
that he shall
charge.

without averring the age, physical condition, or necessities of the ward.⁵ Nor can a surety convert a gratuity by the father into a debt of the ward.⁶

The law requires of a guardian the most scrupulous care and attention in the management of the estate of his ward; he will

Extravagant
expenditures
not allowed.

not, therefore, be allowed credit for expenditures in the indulgence of an obstinate and extravagant boy in squandering the estate by paying to him and for him large sums of money by way of setting him up in business, paying extravagant bills for clothing and other expenses, and furnishing him money that was not necessary, all without a protecting order of the court.⁷ In Mississippi it is held that the statute requires the sum for maintenance and education to be fixed by the Chancery Court, having regard to the future situation, prospects, and distinction of the minor.⁸ In New York the Chancellor directed,

¹ *Newport v. Cook*, 2 Ashm. 332, 339, citing English cases; *Waldrom v. Waldrom*, 76 Ala. 285, 290.

² *Clark v. Montgomery*, 23 Barb. 464, 472; *Beaseley v. Watson*, 41 Ala. 234, 240, citing Alabama cases (this case, the Supreme Court of Alabama remark, carries the principle to the extremest verge and we are unwilling to extend it: *Baines*

v. Barnes, 64 Ala. 375, 384); *State v. Martin*, 18 Mo. App. 468, 475, relying on *Guion v. Guion*, 16 Mo. 48, 52.

³ *Kinsey v. State*, 71 Ind. 32, 39.

⁴ *Corbaly v. Holmes*, 81 Ind. 62, 64.

⁵ *Myers v. State*, 45 Ind. 160, 162.

⁶ *Pratt v. McJunkin*, 4 Rich. L. 5.

⁷ *Mells, in re*, 64 Iowa, 391, 394.

⁸ *Dalton v. Jones*, 51 Miss. 585, 587.

on the appointment of a guardian, that he was not to pay anything for the support of the ward, unless he consented to prosecute his studies, or to get into some regular business under the direction of his guardian.¹

§ 52. *Religious Instruction of Wards.* — Chancery courts in England take cognizance of the rights and duties of guardians in respect of the religious education of their wards;² but in the United States, aside from the statutory provisions touching the religious professions of persons appointed as guardians,³ the subject has received little or no judicial attention. The law, which forbids the appointment of a guardian whose religious faith differs from that of the parents, demands that he should refrain from any attempt to erase the impressions made in this direction by the parents on the mind of the child; and if he use harsh or unfair means to do so, or to put the child's conscience to any kind of torture, the law demands his removal.⁴

¹ *Kettletas v. Gardner*, 1 Paige, 488.

² As to which see *ante*, § 32.

³ *Schoul. Dom. Rel.* § 340; *Story Eq. Juris.* § 1340.

⁴ *Nicholson's Appeal*, 20 Pa. St. 50, 54.

CHAPTER VII.

OF THE GUARDIAN'S AUTHORITY IN RESPECT OF THE WARD'S ESTATE.

§ 53. **Nature of the Guardian's Title to his Ward's Property.** — There is great similarity between the powers and duties of a guardian in respect of the property of his ward, and of an executor or administrator in respect of the estate of his deceased testator or intestate. Both classes of functionaries are treated in law, in many respects, like trustees, holding a legal, but not beneficial title to the property intrusted to their custody. Text-writers and courts find it convenient to include executors and administrators in discussing the powers, rights, duties, and liabilities of trustees;¹ and guardians, notably guardians in socage and testamentary guardians, were early recognized, at common law and under the statute of Charles II., as trustees, with not a bare authority, but an actual interest in their ward's estate.² But while this similarity has been still increased in America by reason of statutory departures here from the common law, greatly affecting the powers of executors and administrators, and defining the authority of guardians, whether testamentary or under judicial appointment, so that the power of a guardian over the property of his ward in respect of choses in action coming into his hands is held to be the same as that of an executor or administrator,³ and his relation to the Probate Court and to the minor is, though not in all respects, of the same legal complexion as that of the executor or

¹ Woerner on Adm. § 10.

² Schoul. Dom. Rel. § 321, citing *Beaufort v. Berty*, 1 P. Wms. 702, 704; *Eyre v. Shaftesbury*, 2 P. Wms. 103, 107; *Gilbert v. Schwenck*, 14 M. & W. 488, 493.

³ *Mason v. Buchanan*, 62 Ala. 110, 112.

In *Hunter v. Lawrence*, 11 Gratt. 111, 130, it is held that a guardian has sufficient title to sell his ward's property, whether such title be legal or equitable, or partly either, citing Chancellor Kent in *Field v. Schieffelin*, 7 Johns. Ch. 150.

administrator,¹ yet a fundamental difference exists in this, that while executors and administrators hold the legal title of decedents to personal property for the benefit of creditors and distributees, the legal as well as beneficial title to both real and personal property remains in the ward,² which the guardian can in no wise bind by any promise or contract of his own.³ But the right of possession of real and personal property is in the guardian;⁴ so that, if injury is done to it, the guardian, and not the ward, can maintain an action of trespass, and if the guardian recover, he must account to the ward;⁵ it may therefore be said, in this respect, that the guardian of a minor has an authority coupled with an interest, not a bare authority, in the ward's estate,⁶ although it is generally held that the guardian's power is a naked one.⁷

Difference between guardian's title and title of administrator.

Legal title in ward.

Right of possession in guardian.

Authority coupled with an interest,

naked.

It results from this principle that the guardian must sue in his own name for any injury to the possession, but in the name of his ward for any right of the ward lying in action.⁸

But since the guardian's office is one of trust and obligation, his possession of the ward's estate, as well as all of his official acts in connection therewith, must be for the ward's, and not for his own, interest. Hence, it is not within the authority of a guardian to avoid a beneficial contract made by his ward,⁹ or to waive any benefit to which his ward is entitled,¹⁰ or to release any security belonging to the ward,¹¹ or to revive a debt against the ward which is prescribed or barred by limitation,¹² or

Guardian's possession for benefit of ward.

He cannot avoid a beneficial contract, etc..

¹ *Fox v. Minor*, 32 Cal. 111, 116.

² 2 Kent, *227 (note *x*³ by the editor of the 13th edition); *Rollins v. Marsh*, 128 Mass. 116, 118; *McDuffie v. McIntyre*, 11 S. C. 551, 560; *Hutchins v. Dresser*, 26 Me. 76, 78; *Longmire v. Pilkington*, 37 Ala. 296, 297; *Newton v. Nutt*, 58 N. H. 599, 601; *Moore v. Hazelton*, 9 Allen, 102, 104.

³ *Dalton v. Jones*, 51 Miss. 585.

⁴ *Lee v. Lee*, 55 Ala. 590, 596.

⁵ *Truss v. Old*, 6 Rand. 556, 558. See as to suits by or in behalf of wards, *post*, § 58.

⁶ *Lincoln v. Alexander*, 52 Cal. 482, 486; *Ware u Ware*, 28 Gratt. 670, 673.

⁷ *Rollins v. Marsh*, *supra*; 1 Parsons on Contracts, B. 1, ch. ix. § 2; *Granby v. Amherst*, 7 Mass. 1, 6.

⁸ *Sutherland v. Goff*, 5 Port. 508, 512. See, as to whether suit should be in the name of the guardian or of the ward, *post*, § 58.

⁹ *Oliver v. Houdlet*, 13 Mass. 237.

¹⁰ *Hite v. Hite*, 2 Rand. 409, 417 (holding further that a decree in pursuance of such waiver is erroneous); *Forbes v. Mitchell*, 1 J. J. Marsh. 440, 441.

¹¹ *Water Valley v. Seaman*, 53 Miss. 655, 660.

¹² *Clement v. Sigur*, 29 La. An. 798, 802.

nor confess judgment, to confess judgment against the ward,¹ unless thereto authorized by statute.²

Well-settled as it is, that neither a guardian *ad litem*,³ nor a general guardian, can bind his ward by admission of facts not proved, or by suffering judgment by default,⁴ it follows that they can make no binding agreement as to the proportion that a claim against an estate in which the wards have an interest shall bear;⁵ nor is the ward bound by the declaration of the tutor in an affidavit touching the date of his indebtedness.⁶

Whatever of profit or advantage arises from the guardian's management of the ward's estate, accrues to the ward and not to the guardian.⁷ He cannot retain for his own use the benefit of

nor profit by contracts in behalf of ward. any contract he may make affecting the ward's property, but it belongs to the latter;⁸ so that if he pay a debt of the ward in depreciated currency, he can be allowed credit for the scaled value of such currency only;⁹ the purchase of an adverse claim against the ward by his guardian is treated as a purchase for the ward, and he can charge the estate no more than he paid for the claim,¹⁰ nor can he acquire a title in himself adverse to the ward.¹¹ But a guardian having lawfully contracted a debt for the maintenance of his ward is entitled, as well as the sureties on his bond, to credit therefor, although he has not paid it, and the creditor has given him a personal release.¹²

§ 54. **Guardian's Power to convert his Ward's Estate.** — It may be stated as a general proposition, valid in all the States unless

¹ Metcalfe v. Alter, 31 La. An. 389.

² As in California, where the general guardian is authorized to consent to partition of his ward's interest in land without action, from which the court deduce the right of the guardian to consent to a mere course of procedure authorized by statute: Richardson v. Loupe, 80 Cal. 490, 500.

³ McClay v. Norris, 9 Ill. 370, 385; Enos v. Capps, 12 Ill. 255; Bennett v. Bradford, 132 Ill. 269, 272; Bank v. Ritchie, 8 Pet. 128, 144; and see ante, § 21.

⁴ Gooch v. Green, 102 Ill. 507, 513; Bearinger v. Pelton, 78 Mich. 109, 114.

⁵ Lusk v. Kershow, 17 Col. 481, 487; Lusk v. Patterson, 2 Col. App. 306, 311.

⁶ Neal v. Lapleine, 19 S. (La.) 261.

⁷ 2 Kent, *229; Eberts v. Eberts, 55 Pa. St. 110, 119; Turner v. Turner, 33 S. W. (Ky.) 1102.

⁸ Sparhawk v. Allen, 21 N. H. 9; Rankin v. Miller, 43 Iowa, 11, 22.

⁹ State v. Pebbles, 70 N. C. 10.

¹⁰ Lee v. Fox, 6 Dana, 171, 176; Hanna v. Spotts, 5 B. Mon. 362, 368.

¹¹ Culberhouse v. Shirey, 42 Ark. 25, 28.

¹² Kinsey v. State, 71 Ind. 32.

affected by statutory regulation, that a guardian has no power without special authorization thereto by a court of competent jurisdiction, to sell his ward's real estate, or convert it into personalty; nor to convert his personal into real estate, or buy land with his ward's money.¹ The unauthorized purchase of real estate with the ward's money constitutes devastavit,² even if made under order of court, if the court was not possessed of jurisdiction,³ unless ratified by the ward when of age.⁴ And where a tutor was authorized to purchase real estate with his ward's money, for cash, and purchases such real estate for part cash and part on credit, such purchase does not bind the ward.⁵ On reaching majority, the ward is put to his election to hold the guardian liable for the money expended in payment for the real estate, with interest, and to reconvey the real estate, or to ratify the purchase;⁶ and if the ward, after reaching majority, use and enjoy the proceeds of the unauthorized sale of his real estate by his guardian, this will amount to a ratification of the conversion, and to an election to take the proceeds instead of the land.⁷ It should be remembered in this connection, that the well-known principle of law, according to which a trust results for the trust estate where the trustee buys property with the trust money and takes the title in his own

Guardian has no power to sell his ward's real estate without order of court; nor to buy real estate,

unless ward ratify when of age.

¹ 2 Kent, *230; 2 Sto. Eq. Juris. § 1357; *Attridge v. Billings*, 57 Ill. 489, 494; 2 Perry on Trusts, § 606. The latter author gives an interesting account of the origin and history of the rule in England, coming to the conclusion that "there seems now to be no principle at the bottom of the rule; and therefore it has been said in some cases, that where the advantage or convenience of the infants called for a change in the nature of the property, the court would order it. In other and later cases, the jurisdiction and power of the court to change the nature of an infant's property have been denied; and it seems now to be the established rule, that such change cannot be made even for the advantage of the infant:" 2 Perry on Trusts, § 605. It will appear, *infra*, that in America the infant's interest is the paramount consideration. But the unauthorized conversion of real into personal property has been

held such mismanagement of a ward's estate as to authorize the guardian's removal, although a full and fair price was obtained: *Ex parte Crutchfield*, 3 Yerg. 336.

² *West v. West*, 75 Mo. 204, 206; *Robinson v. Pebworth*, 71 Ala. 240, 245; *Royer's Appeal*, 11 Pa. St. 36, 40; *Boisseau v. Boisseau*, 79 Va. 73, 77; *McReynolds v. Anderson*, 69 Iowa, 208, 209; and the sale is void: *Kendall v. Miller*, 9 Cal. 591.

³ *Woods v. Boots*, 60 Mo. 546; *Skelton v. Ordinary*, 32 Ga. 266, 272; *Rogers v. Dill*, 6 Hill (N. Y.), 415.

⁴ *Collins v. Dixon*, 72 Ga. 475, 477; *Moore v. Moore*, 12 B. Mon. 651, 662; *White v. Parker*, 8 Barb. 48, 53; *Cassedy v. Casey*, 58 Iowa, 326, 328.

⁵ *Williams v. Chotard*, 11 La. An. 247.

⁶ *Eckford v. DeKay*, 8 Paige, 89, 103; *Morrison v. Kinstra*, 55 Miss. 71, 76.

⁷ *Moore v. Moore*, *supra*; *Caplinger v. Stokes*, Meigs, 175, 179.

name, applies fully to guardians and curators; the funds may be followed into the property in which they have been invested, so that land purchased by a guardian with his ward's funds is, in equity, the ward's property.¹

It follows from the general principle stated that a guardian is not permitted, without judicial authorization, to improve the real estate of his ward; and that if he advances money out of his own pocket in doing so, he cannot recover the amount from the ward,² nor receive credit in his accounting for the money of his ward so applied, although the court would, if applied to beforehand, have ordered the improvement to be made.³ This rule has been so strictly upheld, that a guardian, having obtained an order of the court to improve his ward's real estate by the erection of dwelling-houses thereon, at a cost not exceeding a sum mentioned in the order, was refused credit for certain items of expense, admitted to be indispensable to their completion, in excess of the amount limited.⁴ And so, where the order was to erect "out of the funds of the wards" a building upon their lots, the erection of a building on credit was held unauthorized; and the mechanics, having done the work, were not allowed to recover.⁵ And where a stepfather voluntarily supports an infant, and negligently assuming her property to belong to the infant's mother, his wife, erects houses thereon, he is without remedy against the infant for the amount of these expenditures.⁶

On the principle involved in this rule, a guardian cannot bind his ward by a lease covenanting that the lessee should be repaid, at its expiration, the value of improvements erected by him.⁷

But there are cases in which the guardian's outlays for permanent improvements of the ward's real estate have been allowed, if suitable and obviously for the infant's benefit,⁸ or, in some States, if the improvement was such as the

¹ *Patterson v. Booth*, 108 Mo. 402, 413. See also *Shelton v. Lewis*, 27 Ark. 190, 196, citing numerous authorities, p. 197; *Johnston v. Janes*, 48 Ga. 554, 559.

² *Hassard v. Rowe*, 11 Barb. 22; *Lane v. Taylor*, 40 Ind. 495, 501.

³ *Miller's Estate*, 1 Pa. St. 326; *McCracken v. McCracken*, 6 T. B. Mon. 342, 349.

⁴ *Snodgrass' Appeal*, 37 Pa. St. 377.

⁵ *Payne v. Stone*, 7 Sm. & M. 367, 373; *Guy v. Du Uprey*, 16 Cal. 195, 200.

⁶ *Haggarty v. McCanna*, 25 N. J. Eq. 48, 51.

⁷ *Barrett v. Cocke*, 12 Heisk. 566.

⁸ *Jackson v. Jackson*, 1 Gratt. 143, 150; *Holbrook v. Brooks*, 33 Conn. 347, 352; *Bonsall's Appeal*, 1 Rawle, 266, 274.

Probate Court should, on application, direct.¹ So an order to invest a ward's money, without defining the amount, in the completion of an unfinished distillery was held to justify a reasonably prudent expenditure for that purpose.² And where a guardian, owning property in common with his ward, makes expensive improvements thereon without sanction of the court, though not entitled to recover one-half the cost thereof, he may yet claim compensation, in a division of the proceeds of sale of the property with the improvements on it, to the extent of the proportionate share of the enhanced value in consequence of the improvements.³ And where buildings were erected by the guardian in which business is carried on for the ward's benefit, it is proper that rent be charged to the ward for the use of such buildings.⁴

It follows likewise from the general principle stated, that a guardian has no power to mortgage his ward's real estate, unless authorized thereto by an order of the court in pursuance of a statute to that effect.⁵ Such mortgage is void, unless the court, in making it, pursues the course pointed out by the statute;⁶ a statute authorizing a probate court "to order the renting, sale, or other disposal of the real and personal property of minors" confers no power on such court to authorize the guardian to mortgage his ward's property.⁷ As a general rule, the power conferred to sell does not include the power to mortgage, hence, power "to sell and dispose of" any bequeathed property, "having an eye to the support and education of the children," confers no power to mortgage such property.⁹

No power to mortgage ward's real estate.

Power to sell is not power to mortgage.

But it is held in Montana, that the absence of a statute authorizing a guardian to mortgage his ward's real estate does not render void a mortgage given by a guardian under an order of the court by which no new debt is created, but

In Montana.

¹ *Waldrip v. Tulley*, 48 Ark. 297, 300; *Shepard v. Stebbins*, 48 Hun, 247, 251; *Cheney v. Roodhouse*, 135 Ill. 257, 265.

² *Powell v. North*, 3 Ind. 392.

³ *Jessup v. Jessup*, 102 Ill. 480, 487.

⁴ *Murphy v. Walker*, 131 Mass. 341, 343 (case of an insane person).

⁵ *Merritt v. Simpson*, 41 Ill. 391, 393; *Wood v. Truax*, 39 Mich. 628, 633; *U. S. Mortgage Co. v. Sperry*, 24 Fed. R. 838, 844, citing earlier Illinois cases, and affirmed in 138 U. S. 313, 325 *et seq.*

⁶ *Edwards v. Taliaferro*, 34 Mich. 13, 15; *Battell v. Torrey*, 65 N. Y. 294, 297.

⁷ *Trutch v. Bunnell*, 11 Oreg. 58.

⁸ *Tyson v. Latrobe*, 42 Md. 325, 337; *Stokes v. Payne*, 58 Miss. 614, citing numerous cases (*pro* and *con*), p. 616 *et seq.*; *Ferry v. Laible*, 31 N. J. Eq. 566, and numerous cases collected by the reporter, p. 567 *et seq.*

⁹ *Stokes v. Payne*, *supra*; *Hoyt v. Jaques*, 129 Mass. 286. See *post*, § 86.

merely an exchange of one creditor for another effected and an advantageous extension of time and reduction of interest secured.¹

The guardian has no power to release a mortgagor from his liability to the ward for money borrowed, or to take a new note and other security from him, without authority from the court; and though new security be given and accepted by the guardian, and the original mortgage released, the debt was not thereby discharged, and the lien to secure it continues in full force.²

The power of a guardian to dedicate his ward's real estate to public use, or to make a deed conveying the right of way over it for the purpose of establishing a public road, is equally limited to cases in which the order of a competent court has been obtained, in the absence of which the deed or dedication is void as to the ward.³ Where

authority exists to lay out additions to cities and towns, it includes the incidental authority to dedicate lands to the public for streets and alleys;⁴ but where the statute conditions the authority to purchase the right of way to be "at a price to be agreed upon," the donation by the guardian is void, although in compliance with an order of the court.⁵ Under a statute authorizing a guardian to agree with a railroad company on an amount of damages to be paid for taking the lands of his infant ward, or to release such company from the infant's claim or right to damages in the premises, it was held, however, that such agreement or release might be made without previous ascertainment of the value of the property by condemnation proceedings.⁶ So the guardian has no power to consent to the taking of the residue of an infant's lot, a part of which had been taken for the opening of a street, although the law authorize adult owners to do so.⁷ A guardian cannot estop his ward by an agreement in a partition suit.⁸

¹ *Northwestern G. L. Co. v. Smith*, 15 Mont. 101.

² *Freiberg v. De Lamar*, 7 Tex. Civ. App. 263, 267, holding that a subsequent purchaser, having knowledge of the existence of the mortgage, is charged with notice of the want of power of the guardian.

³ *State v. Commissioners*, 39 Oh. St. 58; *Watkins v. Peck*, 13 N. H. 360, 377.

⁴ *Indianapolis v. Kingsbury*, 101 Ind. 200, 208.

⁵ *Ind. B. & W. Railway v. Brittingham*, 98 Ind. 294, 300.

⁶ *Louisville v. Blythe*, 11 So. (Miss.) 111.

⁷ *Battell v. Burrill*, 50 N. Y. 13, 16.

⁸ *Rainey v. Chambers*, 56 Tex. 17, 21.

A different rule prevails as to a ward's personal property. No doubt is entertained of the competency of a guardian's power over the disposition of the personal estate, as between him and a *bona fide* purchaser, unless restrained by statute.¹ Although the guardian is liable on his bond for any abuse of this power, yet the vendee takes a good title, if he has no notice of the guardian's fraud.² The guardian's power to sell the ward's personal property without first obtaining license therefor includes the power to sell and transfer a note or debt belonging to the ward, as well as a mortgage securing the same.³ It was held in Louisiana, that a tutor has no right to pledge the notes due to his ward as a security for his own debt; but that, having been thus unlawfully pledged and collected in the name and for account of the tutor, who applied the amount to the payment of his debt, he has no right of action to recover, as tutor, the amount paid in satisfaction of his individual debt.⁴ Property of the ward remains his property, though apparently converted to his own use by the tutor; if the proceeds can be identified, they may be followed and brought back to be appropriated to its original purposes; the tutor's creditors cannot recover it and have it brought back into an insolvency as the tutor's property.⁵

Otherwise as to personal property.

Vendee takes good title.

But many States have enacted statutes avoiding all sales of a ward's property by the guardian, if made without order of court, whether the purchaser have knowledge or not that such property belongs to a ward.⁶ In such case, if a guardian sell without authority, the sale is voidable at the option of the ward on reaching majority.⁷ It was held in South Carolina, that an order for the sale of the ward's negroes, obtained by the guardian on his own petition, without notice to the ward, does not bind the ward, and the guardian is liable for the full value of the negroes.⁸

Sale by guardian inhibited by statute, unless ordered by court.

¹ *Field v. Schieffelin*, 7 Johns. Ch. 150, 154, citing Lord Hardwicke's decision of *Inwood v. Twyne*, Amb. 419; *Woodward v. Donally*, 27 Ala. 198, 201; *Fountain v. Anderson*, 33 Ga. 372, 379; *Wallace v. Holmes*, 9 Blatchf. 65, 69.

² *Bank of Virginia v. Craig*, 6 Leigh, 399, 428; *Wallace v. Holmes*, 9 Blatchf. 65, 69.

³ *Humphrey v. Buisson*, 19 Minn. 221.

⁴ *Semple v. Scarborough*, 44 La. An. 257.

⁵ *Burdeau v. Davey*, 43 La. An. 585, 588, citing *Case v. Beauregard*, 1 Woods, 125, 129.

⁶ *De La Montagnie v. Union Insurance Co.*, 42 Cal. 290; *Bailey v. Patterson*, 3 Rich. Eq. 156.

⁷ *McDuffie v. McIntyre*, 11 S. C. 551, 560.

⁸ *Moore v. Hood*, 9 Rich. Eq. 311.

The incidental conversion by using the ward's funds for the payment of his debts, discharging mortgaged real estate, paying interest on incumbrances, or by foreclosing on mortgages due the ward, buying in the property securing debts due the ward to avoid loss, &c., will be considered hereafter.¹

§ 55. **Reducing the Ward's Property into Possession.** — Among the most obvious powers and duties of guardians in respect of the

Guardians must collect and hold all property of the ward. estates of their wards is the collection of legacies, distributive shares, and other dues coming to them; as well as to take and hold property settled upon the

wards without the interposition of trustees, and collect dividends, interest, and income generally, and moneys due on bonds or mortgages.² At common law the guardian is required to take possession of his ward's property,³ and is therefore liable not only for what actually comes into his hands, but for such property as he might have taken possession of by the exercise of diligence, and without any wilful default on his part.⁴ It is the duty of the guardian of a soldier's heir to ascertain his pension rights and rights to bounty, and pursue claims accord-

But is not liable if successor may collect, or where he cannot collect. ingly;⁵ but he should not be held liable for uncollected pension which his successor may still collect for the ward;⁶ and so he is not liable for the dis-

tributive share of his wards, so long as the administrator continues to be liable for them.⁷ Nor can he be held liable for not collecting what it was neither his official right or duty to collect.⁸ The guardian is appointed for the protection of the whole of the ward's estate, the possible as well as actual interest, and his authority cannot be limited by or to the amount of security he may give.⁹ Where the guardian is himself the

May proceed in equity against himself in favor of ward. surety of a former guardian, so that he cannot maintain an action at law against himself for a debt due by the former guardian, he may proceed in equity in

¹ *Post*, ch. viii., ix.

² Schoul. Dom. Rel. § 342; Chapman v. Tibbits, 33 N. Y. 289; Meiser v. Smith, 2 Ind. App. 37.

³ Bond v. Lockwood, 33 Ill. 212.

⁴ Bond v. Lockwood, 33 Ill. 212, 220; Stewart v. McMurray, 82 Ala. 269, 271; Boaz v. Milleken, 83 Ky. 634, 637.

⁵ Boaz v. Milleken, *supra*; Clodfetter v. Bost, 70 N. C. 733.

⁶ Mattox v. Patterson, 60 Iowa, 434, 437.

⁷ Clark v. Tomkins, 1 S. C. 119, 123.

⁸ Leonard's Appeal, 95 Pa. St. 196, 200.

⁹ Crenshaw v. Crenshaw, 4 Rich. Eq. 14.

behalf of the ward.¹ He may follow his ward's money wherever he can find it, and recover it from one who had obtained it from a former guardian;² and so he is entitled to the possession of a note payable to a third party for the ward's benefit;³ and if a note against a person residing in another State becomes worthless by reason of the guardian's neglect to use reasonable care for its security or collection, he is liable to the ward on his bond.⁴ Since possession follows the use, it has been held that where lands are granted to one in trust for others, if these latter be minors, the right of possession is in their guardian as against the trustee;⁵ but where the whole estate is devised to trustees, with direction to pay the income to minors, their guardian cannot require the money to be paid to or through them.⁶

Liable though debtor live in another State.

Ward's possession of real estate in guardian, unless held by trustee.

It is self-evident that the ward's request of the guardian to abstain from recovering a debt against a debtor is no defence to the guardian.⁷

In collecting the debts due to a ward, the guardian should accept only money; if he accept the debtor's, or some other person's note instead of money, he does so at his peril.⁸ So if, instead of bringing suit, or otherwise compelling payment of notes held by him for his ward against solvent obligors, the guardian forbears, and holds the notes until they become worthless by reason of the insolvency of the debtors, he is liable on his bond for the consequent loss;⁹ *a fortiori*, if the debtor is known to be in embarrassed circumstances.¹⁰ But circumstances may require that the guardian should accept real or personal property in payment of a debt due the ward; if he does so, those who deal with him in good faith are discharged as fully as if payment had been made in money, but the guardian acts at his peril to vindicate the prudence of his action

Collection of debts must be in money,

and in due time,

unless prudence requires a different course.

¹ *Swan v. Dent*, 2 Md. Ch. 111, 117.

² *Fox v. Kerper*, 51 Ind. 148.

³ *Carillo v. McPhillips*, 55 Cal. 130.

⁴ *Potter v. Hiscox*, 30 Conn. 508, 520.

⁵ *Bacon v. Taylor, Kirby*, 368.

⁶ *Estate of Young*, 17 Phila. 511.

⁷ *Johnston v. Miller*, 5 T. B. Mon. 205, 209.

⁸ *Lane v. Mickle*, 43 Ala. 109, 112, affirmed 46 Ala. 600; *State v. Womack*, 72 N. C. 397, 401; *State v. Greensdale*, 106 Ind. 364.

⁹ *McNeill v. Hodges*, 83 N. C. 504, 512; *Covington v. Leak*, 65 N. C. 594; *Coggins v. Flythe*, 113 N. C. 102.

¹⁰ *Wills' Appeal*, 22 Pa. St. 325, 330.

if subsequently questioned by his ward.¹ So if a guardian accepts notes of third persons in payment of a debt due the ward, if the notes be subsequently paid to the guardian, and the proceeds applied for the ward's benefit, the debt is thereby discharged, whether the guardian had authority to accept the notes or not.² Nor is a guardian bound instantly to sue in all directions; the debtors are not to be harassed to extremity, if to all appearances, and in the general opinion, the money is safe in their hands.³ There is no peremptory obligation imposed upon a trustee to sue upon a bond held by him as trustee the moment, or the month, or the year, it becomes due; due regard to the ultimate security of the debt may require him to indulge the debtor, and if, contrary to a reasonable expectation, any portion of the debt be lost, chancery will not hold him liable to make good the debt.⁴ But a guardian who, in ignorance of the law, accepts a smaller sum in payment of a note due to his ward than is due thereon, is liable for the difference, although he acted in good faith, and in accordance with an opinion prevalent among the lawyers at that bar, induced by the ruling of their presiding judge.⁵

§ 56. **The Guardian's Right to sue.** — The duty to take into possession, or collect, the property of the ward, and debts owing him, involves the authority of the guardian to bring the necessary actions to recover the same,⁶ and the allowance, out of ward's estate, of the necessary expenses of suit.⁷ This authority, like every act done by the guardian, must be exercised in good faith, with the diligence and prudence in behalf of the ward's interest which a man of ordinary intelligence would bring to bear upon his own affairs. If, therefore, a guardian wantonly, acting in bad faith, or without reasonable belief that there is a just claim which may be recovered, bring an action in behalf of the ward, he will be responsible for all costs and damages personally; but if he acts in good faith, on the advice of

Power to collect includes power to sue;

but if guardian sue improvidently, or in bad faith, he is liable for costs.

¹ *Mason v. Buchanan*, 62 Ala. 110, 112.

² *Jones v. Jones*, 20 Iowa, 388, 392.

³ *Konigmacher v. Kimmel*, 1 Pa. Rep. 207, 214, approved in *Stem's Appeal*, 5 Whart. 472, 476; *Love v. Logan*, 69 N. C. 70.

⁴ *Waring v. Darnall*, 10 Gill & J. 126, 142.

⁵ *Darby v. Stribling*, 22 S. C. 243.

⁶ *Shephard v. Evans*, 9 Ind. 260; *Torry v. Black*, 58 N. Y. 185, 189.

⁷ *Bickerstaff v. Marlin*, 60 Miss. 509, 515.

respectable counsel, and in the belief that his ward has a just claim that ought to be recovered, he will be allowed reasonable expenses incurred out of the ward's estate, although there was no right to sue.¹ The advice of counsel alone does not protect the guardian; if he advises with counsel who, from inexperience or other cause, is incapable of giving good advice on questions governed by plain principles of law, and acts under the advice of such counsel to the injury of the estate, the loss must be borne by the guardian, because he has not acted with reasonable prudence and diligence.²

The right of a guardian to sue for his ward's interest extends to the distributive share of an infant ordered by the court to be deposited with the county treasurer; the surrogate may order it to be paid to a subsequently appointed guardian duly qualified.³ It extends, also, to property fraudulently obtained from the ward before the guardian's appointment;⁴ and to funds of a ward converted to his own use by a former guardian, whose estate is liable after his death for the amount converted without regard to the amount of his guardianship bond.⁵ So, also, to the recovery of money due upon a claim against the United States.⁶ The guardian, having the right of possession of the ward's personal property, may maintain an action to recover such possession, and sue in replevin in his own name.⁷ Demand made by the natural guardian for the property of his minor child was held, in the absence of a legally appointed guardian, sufficient as a demand to support replevin by the minor by next friend,⁸ and in an early Maryland case the natural guardian was allowed to maintain the action.⁹ In such case, if the guardian sign the replevin bond individually, he is personally liable thereon.¹⁰

Extent of
power to sue
for ward.

May maintain
replevin for
ward's
property.

¹ *Smith v. Bean*, 8 N. H. 15, 18; *Flinn's Case*, 31 N. J. Eq. 640, 643.

² *Savage v. Dickson*, 16 Ala. 257, 259.

³ *Moody's Estate*, 2 Dem. 624.

⁴ *Somes v. Skinner*, 16 Mass. 348, 355 (the case of a guardian of an incompetent person).

⁵ *Harshman v. McBride*, 2 Ind. App. Ct. 382.

⁶ And a contract to pay counsel fifty per cent. of the amount recovered on such

claim, is not void, and binds the guardian in her capacity as such, as well as in her individual capacity: *Taylor v. Bemiss*, 110 U. S. 42.

⁷ *Boruff v. Stipp*, 126 Ind. 32; *Meiser v. Smith*, 2 Ind. App. 37.

⁸ *Newman v. Bennett*, 23 Ill. 427.

⁹ *Smith v. Williamson*, 1 Harr. & J. 147.

¹⁰ *Oliver v. Townsend*, 16 Iowa, 430.

The guardian has no power, without the order of a court of competent jurisdiction, to compromise in behalf of his ward, and the court will not sanction such a compromise unless it be satisfied that the interest of the ward would be promoted thereby;¹ if the guardian compromise by accepting a less sum than is due the ward, without sanction of the court, the ward is not bound thereby, and may disaffirm the transaction.² Such power may, however, be conferred upon a guardian by statute,³ and where the statute authorizes a compromise on the sanction of the judge under advice of a family meeting, it is voidable by the ward if made without such sanction.⁴ When authorized by a court, in conformity with a statute, to compromise a pending suit, such compromise is binding on the ward although he have no notice of the proceeding,⁵ and although it impose new liabilities on the ward.⁶ Compromises made by guardians in fraud of their wards, are self-evidently void;⁷ and if procured by the fraud of a third person, are not binding on either the guardian or ward.⁸ So if a guardian has received from an executor a less sum than was due his ward, the latter may sue either the guardian or the executor for the unpaid amount; the fact that a settlement had been made between the guardian and executor is not conclusive on the ward, but imposes upon him the burden of showing that the settlement was not a complete payment of the amount due.⁹

It is held in New York, that since the law makes it the duty of a guardian to take into custody the property of the ward, and manage the same, and protect it for his benefit, the law gives him all the necessary legal remedies to accomplish this purpose; and that having a right of action in her own name, for any injury to her ward's property, she clearly has the right, acting in good faith, to release and discharge the claim upon a sufficient consideration.¹⁰ From which it would follow that all compromises entered into by a guardian in behalf of his ward, though

¹ *King v. King*, 15 Ill. 167; *Luton v. Wilcox*, 83 N. C. 20, 26; *Underwood v. Brockman*, 4 Dana, 309, 313.

² *Hayes v. Massachusetts Co.*, 125 Ill. 626, 636.

³ *Schee v. McQuilken*, 59 Ind. 269, 275.

⁴ *Burney v. Ludeling*, 47 La. An. 73, 88. But only on a direct action; he can-

not question its validity collaterally: *Graham v. Hester*, 15 La. An. 148.

⁵ *Hagy v. Avery*, 69 Iowa, 434, 437.

⁶ *Smith v. Angell*, 14 R. I. 192, 194.

⁷ *Lunday v. Thomas*, 26 Ga. 537.

⁸ *Underwood v. Brockman*, *supra*.

⁹ *Culp v. Lee*, 109 N. C. 675, 678.

¹⁰ *Torry v. Black*, 58 N. Y. 185.

without previous judicial sanction, are valid, unless assailed by the ward, and adjudged to be improvident or fraudulent.

Guardians may submit controversies respecting the property and interests of their wards to arbitration, and awards made in pursuance thereof are held binding on all the parties thereto,¹ leaving open the question of liability to their wards, if these should subsequently repudiate the award,² which, it seems, they have a clear right to do.³ Guardians have no power to submit to arbitration for their wards when adversely interested to them in the subject-matter of the arbitration; and since the award is not binding on the wards in such case, it is invalid as to all;⁴ nor to submit a cause of action either on behalf of or against an infant, so as to give jurisdiction to the court to adjudicate upon the infant's rights.⁵

Power to submit to arbitration.

And no one but ward may repudiate the award.

§ 57. **Power of Guardians to contract for their Wards.** — As a general proposition, guardians cannot by their contracts bind either the person or estate of their wards.⁶ Such contracts bind the guardians personally, and recovery thereon must be had in an action against them, not against the ward.⁷ A guardian may be authorized by a court of competent jurisdiction to bind his ward by a contract; but in doing so he will not exercise a power belonging to his office, but an extraordinary power conferred for a special purpose.⁸ Nor can a creditor subject the ward's lands to the payment of a debt incurred by the guardian for maintenance and education of the ward, although there was no personal property, and the guardian and his sureties had become insolvent.⁹

Guardians cannot bind ward's estate by contract,

but are bound personally.

Contract binding the ward may be authorized by the court.

¹ Schoul. Dom. Rel. § 343; *Weed v. Ellis*, 3 Caines, 253, relying on *Roberts v. Newbold*, Comb. 318, in which it was held that it is the guardian who submits and binds himself; *Weston v. Stuart*, 11 Me. 326, 329; *Goleman v. Turner*, 14 Sm. & M. 118; *Strong v. Beronjon*, 18 Ala. 168, 173.

² In the case of *Roberts and Newbold*, *supra*, Eyres, J., is reported to have said, "that there are several cases that the submission of an infant is not void, but voidable."

³ *Billings' Law of Awards* 34.

⁴ *Fortune v. Killebrew*, 23 S. W. (Tex.) 976. See also, to similar effect:

Sandoval v. Rosser, 26 S. W. (Tex. Civ. R.) 930.

⁵ *Coughlin v. Fay*, 68 Hun, 521.

⁶ *Jones v. Brewer*, 1 Pick. 314, 317; *Tenney v. Evans*, 14 N. H. 343, 351; *McGavock v. Whitfield*, 45 Miss. 452, 460.

⁷ *Rollins v. Marsh*, 128 Mass. 116, 118; *Adams v. Jones*, 8 Mo. App. 602; *Dalton v. Jones*, 51 Miss. 585; *Elson v. Spraker*, 100 Ind. 374, citing earlier Indiana cases, 375.

⁸ *Reading v. Wilson*, 38 N. J. Eq. 446, 449; to similar effect: *Dalton v. Jones*, 51 Miss. 585.

⁹ *St. Joseph's Academy v. Augustini*, 55 Ala. 493.

But it has been held, under a statute making it "the duty of every guardian of the estate of a minor to take care of and manage such estate in such manner as a prudent man would manage his own," that a contract of the guardian with a land locator to locate a land certificate belonging to his ward, giving him a share in the land for such location, is valid and binding on the ward.¹

On the other hand, it is held, that a guardian cannot charge the real estate of her wards with a liability for necessities furnished

Guardian not liable for necessities ordered for ward, if so stipulated.

them, if she had sufficient personalty for their support and maintenance.² The guardian is not, of course, liable out of his own estate for necessities furnished the ward at his request, if he specially stipulate that not he, but only his ward, shall be charged therefor;³

But is, unless so stipulating.

but unless he limit his liability by express stipulation, to the assets in his hands as guardian, he is personally liable for the whole debt created by the contract, although he contract only as guardian.⁴

So a guardian who leases premises, as guardian, for his ward, is nevertheless personally liable for the rent.⁵ The guardian cannot bind his ward by the stipulation, in a lease, to pay for improvements put on the premises

Ward is not bound by stipulation to pay for improvements, or to remove incumbrance.

by the lessee;⁶ nor in selling land, to remove an incumbrance thereon;⁷ nor will his agreement, without order or sanction of the court having jurisdiction, concerning the partition of an estate in which the ward is interested, operate an estoppel of the minor;⁸

Nor estopped by an agreement in partition.

nor can he, by agreement with the administrator of an estate in which his ward has an interest, waive publication, required by statute, of the administrator's account, and admit its correctness, so as to give jurisdiction to the court, and a decree rendered in consequence of such agreement is void.⁹ And where the guardian

Nor can the guardian waive statutory requirements.

¹ Wren v. Harris, 78 Tex. 349; adhered to in Ellis v. Stone, 4 Tex. Civ. R. 157, 161.

² Roscoe v. McDonald, 101 Mich. 313.

³ Salem Academy v. Phillips, 68 N. C. 491.

⁴ Sperry v. Fanning, 80 Ill. 371, 374, two judges dissenting, pp. 376, 378.

⁵ Hannen v. Ewalt, 18 Pa. St. 9, 11.

⁶ Barrett v. Cocke, 12 Heisk. 566.

⁷ Person v. Merrick (case of a lunatic), 5 Wis. 231, 239.

⁸ Rainey v. Chambers, 56 Tex. 17, 22.

⁹ Wade v. Bridewell, 38 Miss. 420. It should be remembered that the law of Mississippi did not then allow a general guardian to appear to an action against his ward, but required the appointment of a guardian *ad litem*: *Ib.*, 422 and authorities.

brings replevin for his ward and signs the replevin bond individually, he is personally liable on the bond.¹ And so, since the contract of the guardian to pay for the board and tuition of his ward binds him personally, and not his ward, the sureties on the guardian's bond cannot be held liable therefor.²

Guardian is personally liable on replevin bond,

and for the board and tuition of the ward.

It is an old and familiar doctrine that infants, and other persons under disability to contract, are bound, nevertheless, for necessities, to the extent of their reasonable value, to those who furnish them, by reason of the need, or at the request, of the infant; but if furnished at the instance or request of another, such as a parent, friend, or guardian, the infant is not bound,³ unless both the father and the guardian refuse to support the child.⁴ For necessities so furnished by a guardian he will be reimbursed out of the ward's estate;⁵ and where the guardian acts under the orders of a court of competent jurisdiction in contracting, not for necessities, but in other respects for the benefit of the ward, the court will indemnify the guardian for outlays in consequence of the personal liability thereby incurred.⁶ So where the contract of the guardian was entered into at the request of the ward, and ratified by him after majority, the guardian will be allowed, in his settlement with the ward, credit for payments under such contract;⁷ but without ratification by the ward the loss will fall on the guardian.⁸ The guardian can maintain no action against his ward for money advanced, or services rendered as guardian, until he has settled his guardianship account in the court having jurisdiction.⁹ But in Louisiana it was held that a tutor who made a note for necessities furnished his ward, and resigned, receiving no credit for the amount of the note in his settlement with his successor, could not be held liable to the payee, if he had not knowledge of the consideration, but

Ward's estate bound for necessities furnished him at his request.

But not if at the request of some one else.

he will be

Guardian indemnified out of ward's estate.

In Louisiana.

¹ *Oliver v. Townsend*, 16 Iowa, 430.

² *McKinnon v. McKinnon*, 81 N. C. 201; *McNabb v. Clip*, 5 Ind. App. 204; *Lewis v. Edwards*, 44 Ind. 333.

³ 4 Bacon's Ab. tit. Inf. and Age, I.; *Phelps v. Worcester*, 11 N. H. 51, 53; *Simms v. Norris*, 5 Ala. 42.

⁴ *Turner v. Flagg*, 6 Ind. App. 563, 572.

⁵ *Reading v. Wilson*, 38 N. J. Eq. 446, 449; *Brent v. Grace*, 30 Mo. 253, 256.

⁶ *Woodward's Appeal*, 38 Pa. St. 322, 326.

⁷ *In re Wood*, 71 Mo. 623.

⁸ *In re White*, 13 Mo. App. 580.

⁹ *Smith v. Philbrick*, 2 N. H. 395; *Phelps v. Worcester*, 11 N. H. 51, 54.

the estate in the hands of the successor is liable.¹ So a creditor for necessities furnished the ward may recover from him after emancipation, if the amount do not exceed the revenue, and has not been included in the tutrix's account.²

§ 58. **Actions in Behalf of Infants.** — At the common law infants sue and defend by guardian, — not the guardian of the person and estate, but either one admitted by the court for the particular suit, or appointed for suits in general by the king's letters patent. By statute,³ infants were authorized to sue by *prochein ami* in all ac-

Or by next friend. tions; and this remedy was held cumulative, leaving it optional for suit to be brought by guardian or next friend.⁴ The rule now is, that infants can appear only by guardian or next friend, or by guardian *ad litem*,⁵ and that the

Admitted by the court. *prochein ami*, as well as the guardian, is to be admitted by the court without any other record than a recital of the count.⁶ But a suit in behalf of an infant should

In name of infant. be brought in the name of the infant by his guardian or next friend, — not in the name of the guardian.⁷

While it may be held a mere formal irregularity to bring such action in the name of the guardian, so as to affect no material interest, if it appear that the suit is for the sole use and benefit of the ward, yet it is, at all events, the more correct practice to entitle all actions for the ward's benefit in the name of the infant.⁸ In some States the petition, from which it appears that the suit is brought by a guardian for his minor ward, is permitted to be amended on the trial,

¹ Ford v. Miller, 18 La. An. 571.

² Giquel v. Daigre, 22 La. An. 137.

³ Edw. I. ch. 48; and 13 Edw. I. ch. 15.

⁴ Chudley v. Railway Co., 51 Ill. App. 491, 496; Miles v. Boyden, 3 Pickering, 213, 218.

⁵ Lang v. Belloff, 31 Atl. (N. J. Eq.) 604. See as to guardians *ad litem*, ante, § 21.

⁶ Miles v. Boyden, *supra*; Judson v. Blanchard, 3 Conn. 579, 584; Reed v. Ring, 93 Cal. 96, 103, holding that it is erroneous for a guardian not duly appointed to act as such, but the proceeding is not for that reason void.

⁷ Sillings v. Bumgardner, 9 Gratt. 273, 275, relying on Lemon v. Hansbarger, 6

Gratt. 301; Bradley v. Amidon, 10 Paige, 235, 239; Stewart v. Crabbin, 6 Munf. 280; Morgan v. Potter, 157 U. S. 195, 198; Wilson v. Galey, 103 Ind. 257, 260; Muller v. Benner, 69 Ill. 108; Fox v. Minor, 32 Cal. 111, 117; Burdett v. Cain, 8 W. Va. 282, 287; Barnet v. Commonwealth, 4 J. J. Marsh. 389; Carskadden v. McGhee, 7 Watts & S. 140; Dennison v. Willcutt, 35 Pac. (Idaho) 698.

⁸ Vincent v. Starks, 45 Wis. 458, 462. To similar effect: Turner v. Alexander, 41 Ark. 254, 257; Kinney v. Harrett, 46 Mich. 87, 89; Kees v. Maxim, 99 Mich. 493, 497; Texas Central R. Co. v. Stuart, 1 Tex. Civ. R. 642, 648.

so as to show that the suit is brought by the minor.¹ May be amended.
Where no objection is made on the ground of disability to an action by an infant, such objection cannot be made, on appeal, by motion to dismiss.²

Actions in ejectment,³ for waste or trespass on the ward's land,⁴ or for partition,⁵ must be brought in the name of the ward. So it was held in Louisiana, that an action for the annulment of a marriage between infants may be brought without the intervention of tutors.⁶

But for any right belonging to the guardian as such, or for damages arising out of any injury to his possession, or upon his own contract relating to his ward's property, the guardian of a minor may, like a guardian or committee of an insane person, sue in his own name.⁷ Thus suit is properly brought in the name of the guardian for rent under a lease made by the guardian;⁸ for intermeddling with the rents and profits of the minor's real estate;⁹ for trespass thereon,¹⁰ or for injury to any property in the guardian's possession,¹¹ or to which he has the right of possession¹² or of collection;¹³ and so on sufficient consideration, in the absence of fraud, he may release a guarantor of debt owing to the ward, and forbearance to sue may be a sufficient consideration.¹⁴ So it is held in a number of States, that the guardian may sue in his own name to recover a debt due the ward, and where the judgment enures to the ward's benefit;¹⁵ and, *a fortiori*, he may

Actions in name of guardian for injury to guardian's right.

Or for debts and actions enuring to ward's benefit.

¹ Weber v. Hannibal, 83 Mo. 262; Colvin v. Hauenstein, 110 Mo. 575, 584; Van Pelt v. Chattanooga, 89 Ga. 706.

² Hicks v. Beam, 112 N. C. 642, 645.

³ Muller v. Benner, 69 Ill. 108.

⁴ Wilson v. Gailey, 103 Ind. 257, 260; Swift v. Yanaway, 153 Ill. 197, 206.

⁵ Matter of Stratton, 1 Johns. 508.

⁶ Lacoste v. Guidroz, 47 La. An. 295, 301.

⁷ As to the rules for bringing actions by and against insane persons, see *infra*, ch. xviii.

⁸ Pond v. Curtis, 7 Wend. 45.

⁹ Beecher v. Crowse, 19 Wend. 306.

¹⁰ Truss v. Old, 6 Rand. 556.

¹¹ Fuqua v. Hunt, 1 Ala. 197.

¹² Field v. Lucas, 21 Ga. 447, 451; Sutherland v. Goff, 5 Port. 508.

¹³ On a note, for instance, payable to

the guardian for a debt due the ward: Jolliffe v. Higgins, 6 Munf. 3; Baker v. Ormsby, 5 Ill. 325; Hightower v. Maull, 50 Ala. 494; Gentry v. Owen, 14 Ark. 396. Or a bond payable to the indorsee and assigned to the guardian: Catron v. La Fayette Co., 106 Mo. 659, 667; for assets of the ward converted by a predecessor: Harshman v. McBride, 2 Ind. App. 382. In North Carolina the survivor of joint guardians may sue on a note given to them: Biggs v. Williams, 66 N. C. 427.

¹⁴ Ditmar v. West, 7 Ind. App. 637; Fletcher v. Fletcher, 29 Vt. 98, 100; Torry v. Black, 58 N. Y. 185, 190.

¹⁵ Hauenstein v. Kull, 59 How. Pr. 24, 25; Thomas v. Bennett, 56 Barb. 197; Roberts v. Sacra, 38 Tex. 580; Longmire v. Pilkington, 37 Ala. 296, 297.

sue on a bond and mortgage given him for money of the ward loaned out, for which he has accounted to the ward.¹ But in Louisiana a tutor, who had improperly pledged two notes belonging to his ward to secure his own debt, one of which was restored, and the other collected for account of the tutor, and the amount thereof applied in payment of the tutor's debt, has no right to recover the amount so paid.²

The legal right to a promissory note, payable to a guardian in his trust capacity, remains, *prima facie*, in the obligee, notwithstanding his discharge as guardian, and he may sue thereon, unless it be shown that he has parted with the title, so that payment to him would not discharge the obligor.³ And the title in such case, with the right to sue, will pass, on the guardian's death, to his personal representative;⁴ nor does an action on such a note, commenced by a guardian during the ward's minority, abate because the ward has attained majority before its termination.⁵ So a guardian may properly sue for and recover money collected for her as such guardian, notwithstanding the ward's majority before the beginning of the action,⁶ but not after the ward's death.⁷ But in equity a bond made payable to the guardian is the property of the ward, and the ward may sue upon it when turned over to him on the guardian's final settlement, notwithstanding the legal title may have been transferred by the guardian's indorsement to another.⁸

In most of the States, the subject of actions by or in behalf of minors, as well as of actions against minors, is regulated by statute, making it the duty of guardians, mostly, to represent their wards in all legal proceedings, and to defend for them in all courts of the State without further admittance.⁹ A statute authorizing guardians to "demand, sue for, and receive all debts due their wards," has been construed as authorizing,¹⁰ and again as not au-

Actions after
cessation of
guardian's
authority.

Statutory regu-
lations control.

Statutes not
authorizing
suit in guar-
dian's name.

¹ Wright v. Robinson, 94 Ala. 479.

² Semple v. Scarborough, 44 La. An. 257, 263.

³ Chambless v. Vick, 34 Miss. 109; Zachary v. Gregory, 32 Tex. 452, 456.

⁴ Chitwood v. Cromwell, 12 Heisk. 658; Biggs v. Williams, 66 N. C. 427.

⁵ Gard v. Neff, 39 Oh. St. 607, 609.

⁶ Huntsman v. Fish, 36 Minn. 148.

⁷ Barrett v. Provincher, 39 Neb. 773.

⁸ Usry v. Suit, 91 N. C. 406, 415.

⁹ So, for instance, in Indiana: Bundy v. Hall, 60 Ind. 177; Missouri: Rev. St. 1889, § 5298; Ohio: Rankin v. Kemp, 21 Oh. St. 651; Tennessee: Cowan v. Anderson, 7 Coldw. 284, 291.

¹⁰ Harshman v. McBride, 2 Ind. App. 382.

thorizing, the guardian to bring suit in his own name.¹ So a statute providing that he "shall be allowed in all cases to prosecute and defend for" his ward does not entitle the guardian to bring suit in his own name;² nor one declaring that he "may bring an action without joining with him the person for whose benefit the suit is prosecuted;"³ nor one authorizing executors, administrators, or the trustees of an express trust to sue in their own name, without mentioning guardians.⁴ So judgment in a suit by a father, or mother, or next of kin, under a statute authorizing such suit, to recover damages for an injury to a minor, is a bar to any subsequent action for the same cause by the minor, by his guardian (general or *ad litem*), or by himself when of age.⁵ In such case the money should be paid to a duly appointed guardian.⁶ But where the action is given to either or both of the parents *and* to the child, an action by the latter is not barred by judgment in favor of the former, if, though arising out of the same act of carelessness or negligence, on part of the defendant, the damages sued for by the child are such as could not have been considered or compensated in the former action.⁷

Damages recovered for injury bar later suit for same cause,

but not for damages peculiar to parent or child.

On the well-recognized principle that where one party contracts with another for the benefit of a third party, the third party may bring an action for breach of such contract,⁸ a child may sue for damages for the breach of a contract made by her parents in her behalf;⁹ and in such case the father, suing as next friend of the minor, thereby releases the defendant from any liability to himself that may be supposed to arise to him out of such contract.¹⁰

Child may sue for damages for breach of contract made in its behalf.

One of the consequences of the distinction made in the right to sue by or in the name of the ward, and by or in the name of the

¹ *Hutchins v. Dresser*, 26 Me. 76, 78; *Perine v. Grand Lodge*, 50 N. W. (Minn.) 1022.

² *Hoare v. Harris*, 11 Ill. 24.

³ *Anderson v. Watson*, 3 Metc. (Ky.) 509.

⁴ *Perine v. Grand Lodge*, 50 N. W. (Minn.) 1022.

⁵ *Lathrop v. Schutte*, 63 N. W. (Minn.) 493.

⁶ *City v. Colgate*, 27 S. W. (Tex. Civ. App.) 896.

⁷ *McNamara v. Logan*, 100 Ala. 187, 195.

⁸ *Gooden v. Rayl*, 85 Iowa, 592, 595; *Anthony v. Herman*, 14 Kans. 494.

⁹ *Strong v. Marcy*, 33 Kans. 109.

¹⁰ *Gooden v. Rayl*, *supra*.

guardian, is emphasized in a Georgia case, deciding that the statute of limitation does not run against a minor, although he has a guardian competent to sue, where the right of action is in the minor, and not in the guardian.¹

§ 59. **Actions against Infants or Guardians.**—It follows from the principle hereinbefore stated,² negating any power in the

guardians of minors to bind their wards by contract, that actions on such contracts must be brought against the guardians personally, not against their wards;³ and that judgment in such case, if for the plaintiff, cannot, obviously, be against the estate of the ward, but must also be against the guardian personally.⁴ Judgment against *the guardian* affects him only as an individual, because the addition of the word "guardian" is simply descriptive,⁵ in no wise estopping or binding the ward or his estate.⁶

Conversely, no action lies against the guardian upon the ward's contracts or debts,⁷ but only against the ward, who may defend by guardian.⁸ Even though the statute provides for a recovery on such debt by proceeding against the guardian, yet the declaration should be against the ward.⁹ Nor can there be a joint action against guardian *and* ward.¹⁰

But while the guardian is not personally liable for the debts of his ward,¹¹ or for necessities furnished him,¹² yet it is his duty to pay, so far as he may have assets, the debts of his ward;¹³ and for refusing to do so, the creditor may have an order of the Probate Court to put the guardian's bond in suit;¹⁴ or such refusal may, without such order, be treated as a breach of the bond,

¹ "Because the guardian might have sued in the name of his ward to recover the property, but failed to do so, will not operate to the prejudice of the infant:" *Monroe v. Simmons*, 86 Ga. 344, 346.

² *Ante*, § 57.

³ *Forster v. Fuller*, 6 Mass. 58; *Stevenson v. Bruce*, 10 Ind. 397; *Tobin v. Addison*, 2 Strobb. L. 3; *Hunt v. Maldonado*, 89 Cal. 636.

⁴ *Clark v. Casler*, 1 Ind. 243; *Tobin v. Addison*, *supra*.

⁵ *Tobin v. Addison*, *supra*; *Rollins v. Marsh*, 128 Mass. 116.

⁶ *Morris v. Garrison*, 27 Pa. St. 226.

⁷ *Bentley v. Torbert*, 68 Iowa, 122.

⁸ *Brown v. Chase*, 4 Mass. 436.

⁹ *Arnold v. Angell*, 1 R. I. 289; *Willard v. Fairbanks*, 8 R. I. 1.

¹⁰ *Allen v. Hoppin*, 9 R. I. 258.

¹¹ Not in assumpsit, for instance, for labor performed on buildings belonging to the ward: *Robinson v. Hersey*, 60 Me. 225.

¹² *Cole v. Eaton*, 8 Cush. 587, 588.

¹³ *Conant v. Kendall*, 21 Pickering, 86, 40.

¹⁴ *Conant v. Kendall*, *supra*.

making such guardian and his sureties liable to the amount of the assets belonging to the ward's estate.¹

The subject of actions against the estates of minors is, as already mentioned,² minutely regulated by statute in most States, including the method of service of notice in such suits. Judgment and all orders made where there was no service of notice may be void;³ but it was held in Missouri, that in a partition proceeding a minor defendant is bound by the judgment of a court if his appearance was entered by his general guardian, although no process was served on the minor;⁴ and where the statute does not require personal service on the ward, his general guardian must be notified, and it is error to refuse him to become a party to a proceeding for the condemnation of the ward's land,⁵ and the court may appoint a guardian *ad litem* for him.⁶ Such statutes, and the rules of court in relation to the manner of service, must be strictly complied with;⁷ and the return of the process should show how it was executed, — the return merely stating "executed in full," or "duly executed," or the like, is insufficient.⁸ The summons, when returned, is *functus officio*, and service thereafter is utterly void. Service upon a guardian, where service on the defendant is obligatory, binds neither the guardian nor the ward; a judgment or decree rendered thereon is absolutely void.⁹ So service by handing a copy of the notice to the infant, instead of leaving a copy with the custodian, as required by statute, is insufficient.¹⁰ But if the return be regular on its face, it is conclusive until set aside, and cannot be contradicted collaterally.¹¹ Service on non-resident minors may be made in the same manner as upon adults, under a statute making no distinction between adults and minors in this respect.¹²

Statutes regulating actions are strictly construed.

Service after return is void.

Return is conclusive, if regular on its face.

¹ Cases, *supra*; Raymond v. Sawyer, 37 Me. 406.

² Ante, § 58, p. 190.

³ Terrell v. Weymouth, 32 Fla. 255, 261.

⁴ Payne v. Masek, 114 Mo. 631, citing among other cases Le Bourgeoise v. McNamara, 82 Mo. 189; Hite v. Thompson, 18 Mo. 461.

⁵ Charleston Bridge Co. v. Comstock, 36 W. Va. 263, 273.

⁶ Parker v. McCoy, 10 Gratt. 594, 606; Charleston Bridge Co. v. Comstock, *supra*.

⁷ Herring v. Ricketts, 101 Ala. 340, 342.

⁸ Carter v. Ingraham, 43 Ala. 78, 82; Coster v. Bank, 24 Ala. 37, 65. To same effect: McDermott v. Thompson, 29 Fla. 299.

⁹ Fanning v. Foley, 99 Cal. 336.

¹⁰ Herring v. Ricketts, *supra*; Hatch v. Ferguson, 57 Fed. 966, 968.

¹¹ Kennedy v. Baker, 159 Pa. St. 146, 151; Andrews v. Andrews, 7 Heisk. 234, 244.

¹² Hale v. Hale, 146 Ill. 227, 243.

The guardian will be allowed credit for the expenses incurred in good faith in defending an action against his ward, although judgment be rendered against the ward.¹ He may appear in a suit against the ward for partition, and plead in his behalf, and appeal in his own name.² The appearance by a guardian, for his ward, under a statute authorizing him thereto, waives defects in the service of the notice.³ So a judgment cannot be collaterally attacked for want of notice to the ward, if a guardian *ad litem* had been appointed for him;⁴ and the answer of a guardian *ad litem*, though only formal, is sufficient to interpose any defence that may appear in behalf of the minor defendant in the evidence,⁵ although it is the duty of such guardian to submit to the court every question involving the rights of the ward.⁶

In New Jersey it is held, that it is the duty of a court of chancery to set up the statute of limitation in favor of an infant defendant, in an undefended suit brought against such defendant by her mother, even against the will of the defendant herself, unless the case discloses some circumstance which renders such plea inequitable.⁷

Some States provide that claims against minors may be filed in the Probate Court, within a certain time after the appointment, payable out of the ward's estate, after notice to the guardian, and proceeding similarly as in cases of claims against the estates of deceased persons.⁸ Under such a statute, requiring every creditor of a ward to exhibit his claim to the guardian within six months after notice of the guardian's appointment, and providing that every claim not so presented shall be forever barred of all claim therefor against the guardian, unless there be surplus property in his hands after paying all debts properly presented and expenses, that the service of a writ of attachment against the

¹ *Mathes v. Bennett*, 21 N. H. 204, 217.

² *Miller v. Smith*, 98 Ind. 226, 228; similarly in Missouri: *State v. Cayce*, 85 Mo. 456, 461.

³ *Ankenny v. Blackiston*, 7 Oreg. 407, 413; *Cowen v. Anderson*, 7 Coldw. 285.

⁴ *Smith v. Gray*, 116 N. C. 311.

⁵ *Skaggs v. Kincaid*, 48 Ill. App. 608, 615.

⁶ *Stark v. Brown*, 101 Ill. 395, 398. See, as to the powers and duties of guardians *ad litem*, *ante*, § 21.

⁷ *Alling v. Alling*, 52 N. J. Eq. 92, 94. To same effect: *Keyes v. Ellensohn*, 72 Hun, 392.

⁸ *Turner v. Flagg*, 6 Ind. App. 563, 572; *Wakefield Trust Co. v. Whaley*, 17 R. I. 760; *Low v. Felton*, 84 Tex. 378.

guardian, in behalf of a creditor who had failed to present his claim in time, was void; but that such creditor's claim might be satisfied out of any property afterward acquired by the ward.¹ It is also held that the remedy so given to creditors is not absolutely conditioned upon a previous presentation of their claims.² But it seems that no such power exists in probate courts without express statutory provision to that effect.³

In Rhode Island the neglect of a guardian to notify creditors of his ward to present their claims within six months of the date of the notice is held a breach of his bond.⁴

¹ Wakefield Trust Co. v. Whaley, 17 R. I. 760.

² Low v. Felton, 84 Tex. 378, 384.

³ "There is no clause of the act which gives jurisdiction to the County [probate] Court of any demand against a minor while living. If he becomes liable to an action, he is to be sued in the other courts,

and satisfaction of any judgment recovered against him is obtained in the same manner as if he were an adult:" Gamble, J., in George v. Dawson, 18 Mo. 407, 408. To same effect: McNabb v. Clip, 5 Ind. App. 204, 206.

⁴ Court of Probate v. Caswell, 18 R. I. 201.

CHAPTER VIII.

OF THE MANAGEMENT OF THE WARD'S ESTATE.

§ 60. **General Principles of the Responsibility of Guardians in Managing the Ward's Estates.** — It results from the nature of the

Guardians can
reap no per-
sonal benefit at
cost of the
wards;

guardians' office that the law cannot permit them to reap any personal benefit therefrom at the cost of the wards; for their office is to protect the interests of the wards. This principle needs no citation of

authorities; it is announced in most of the cases adjudicating between guardian and ward, and is self-evident. Hence, it is said that chancery not only punishes corruption in guardians, but treats with suspicion all acts and circumstances evincing a

cannot bind
their wards by
any contract
injurious to
them;

disposition on their part to derive undue advantage from their position.¹ The guardian cannot bind his ward by a contract injurious to the latter.² He cannot trade with himself on account of his ward,³ nor

cannot trade
with ward.

buy or use his ward's property for his own benefit, or as agent for another.⁴ All advantageous bargains

Advantageous
bargains enure
to ward's bene-
fit.

he makes affecting the property of his ward shall enure to the ward's benefit.⁵ If at a foreclosure of a security taken by him on lending out his ward's

money he take the title in his own name, he will be entitled to credit for the amount actually bid only, although less than the

¹ Schoul. Dom. Rel. § 348, p. 514, 2 Kent, *229; Jennings v. Kee, 5 Ind. 257, 259.

² See *ante*, § 57.

³ White v. Parker, 8 Barb. 48, 53.

⁴ Lefevre v. Laraway, 22 Barb. 167; "The object of the statute," says Page, J., in this case, p. 176, "was to secure in behalf of the infant, the best judgment, skill, and exertions of his guardian. There can be no certainty in accomplishing this end, if the guardian is permitted to purchase

either for himself or a third person. . . .

It is for this reason that the law declares, without any previous investigation, that a purchase by a trustee of the trust property for his own benefit, is absolutely void." Kennaird v. Adams, 11 B. Mon. 102, 110; Mann v. McDonald, 10 Humph. 275; Lane v. Taylor, 40 Ind. 495, 501; Brockett v. Richardson, 61 Miss. 766, 781; Beal v. Harmon, 38 Mo. 435, 438.

⁵ Allen v. Sparhawk, 21 N. H. 9, 22.

amount of the debt, and is liable for the difference, unless the ward elect to take the land.¹ No person having an interest in property adverse to that of an infant should be appointed his guardian; but when it is done, it must be attended with the surrender of such interest to the court on accepting the appointment.²

Conflicting interests must be surrendered.

The doctrine that a person standing in a fiduciary relation to property cannot be allowed to purchase or hold it for his own use or benefit against the objection of the *cestui que trust*, is fully applicable to guardians; and likewise the rule that the principle does not apply where no advantage can be taken by the trustee, or knowledge gained by reason of the fiduciary relation, to affect injuriously the interest of *cestuis que trustent*, or advance that of the trustee. Thus a guardian may lawfully become the purchaser of his ward's real estate sold by a sheriff under a judgment against the personal representative of the ward's ancestor.³ Purchases by the guardian of his ward's property are not absolutely void, even in equity, but voidable at the election of the ward within a reasonable time.⁴

Cannot buy ward's property, except when his fiduciary capacity gives him no advantage.

Guardians acting within the scope of their authority are bound to the observance of fidelity, and such diligence and prudence as men of ordinary intelligence observe in managing their own affairs.⁵ In the general sense of the word "trust," guardianship is included within its meaning;⁶ guardians are trustees, and liable as other trustees;⁷ and since courts of equity regard all infants as wards of the court, under its special cognizance and protection, their guardians are, like other trustees, amenable to such court,⁸ save as by statute the jurisdiction over guardians may be vested elsewhere. And "if there is no *mala fides*,—

Guardians are safe in acting honestly within their powers;

are liable as trustees;

¹ *Dietterich v. Heft*, 5 Pa. St. 87, 94.

² Hence, where a guardian authorized to sell his ward's land to which he holds a tax title, the sale by him of such tax title is held to accrue to the ward's advantage, and he must account therefor to the ward, less his payments and expenses, with interest, in obtaining the title: *Spelman v. Terry*, 8 Hun, 205, 208.

³ *Chorpenning's Appeal*, 32 Pa. St. 315,

316; *Blackmore v. Shelby*, 8 Humph. 439; *Crump, Ex parte*, 16 Lea, 732.

⁴ *Hoskins v. Wilson*, 4 Dev. & B. 243, 245.

⁵ *Glover v. Glover*, 1 McMull. Eq. 153.

⁶ *Perry on Trusts*, § 1.

⁷ *Spear v. Spear*, 9 Rich. Eq. 184, 200; *Beauford v. Berty*, 1 P. Wms. 702, 704; *Frederick v. Frederick*, 1 P. Wms. 710, 721; *McLean v. Hosea*, 14 Ala. 194, 196.

⁸ *Perry on Trusts*, §§ 603 *et seq.*

will be protected if acting *bona fide* with such skill and sound discretion as men of ordinary intelligence use in their own affairs.

nothing wilful in the conduct of the trustee, — the court will always favor him.”¹ Thus “the general rule is recognized everywhere, that a guardian, when investing property in his hands, is bound to act honestly and faithfully, and to exercise a sound discretion, such as men of ordinary prudence and intelligence use in their own affairs;”² there is no pre-

sumption against the guardian of improper conduct,³ and where a guardian, in the exercise of a power conferred upon him by law, acts in good faith, uses due care and prudence, having regard to the best pecuniary interests of his wards, he will not be personally liable for any loss arising out of such transaction,⁴ though arising from an honest error in judgment.⁵

But although courts feel bound to shield trustees from harm in the honest and faithful discharge of their duties in their fiduciary character, they will also studiously exercise a vigilant care in protecting the interests of those who are incapable of protecting themselves.⁶ Hence, sales

Courts are vigilant in protecting wards,

and will avoid a guardian's sale where the purchaser has knowledge of the misapplication of funds, though innocent himself.

made by guardians will be set aside in equity when they are injurious to the wards,⁷ even against a purchaser who paid full value and was not in collusion with the guardian, if he had knowledge that the guardian contemplated the misapplication of the purchase price; and the acceptance of the cancellation of the purchaser's claim against the guardian personally as part of the purchase price charges him with such knowledge.⁸ It is said

¹ Per Lord Hardwicke, in *Knight v. Plymouth*, as reported in 1 Dick. 120, 126. “For as a trust is an office necessary in the concerns between man and man,” says he, “and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it: to add hazard or risque to that trouble, and to subject a trustee to losses which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office.”

² Gray, J., pronouncing the opinion of the Supreme Court of the United States in *Lamar v. Micou*, 112 U. S. 452, 465.

³ *Wainwright v. Burroughs*, 1 Ind. App. 393, 399.

⁴ *Lamar v. Micou*, *supra*, p. 476; *Slaughter v. Favorite*, 107 Ind. 291, 294; *Finley v. Schluter*, 54 Mo. App. 455, 458; *Taylor v. Hite*, 61 Mo. 142, 144.

⁵ *McElheney v. Musick*, 63 Ill. 328, 330; *Barney v. Parsons*, 54 Vt. 623; *Neff's Appeal*, 57 Pa. St. 91, 96.

⁶ *Jenkins v. Walter*, 8 Gill & J. 218, 222.

⁷ *Leonard v. Barnum*, 34 Wis. 105, 111.

⁸ *McDuffie v. McIntyre*, 11 S. C. 551, 563; *Bevis v. Hefflin*, 63 Ind. 129, 134.

to be a familiar and well-established principle that trusts may be enforced against all persons who come into possession of the property bound by the trust with notice, as well as against the original trustee;¹ and this principle is fully applicable to guardians.² So a guardian may follow his ward's property, whether it be in the hands of a former guardian, or of such guardian's transferee.³ But the fraud of the guardian does not of itself invalidate his sale of the ward's property to an innocent purchaser; as between the guardian and the purchaser the latter takes a good title, if the guardian had authority to sell, and the purchaser had not co-operated in the fraud, and was not chargeable with notice thereof.⁴ Neither the guardian, nor his sureties, nor his assignees are liable for an unauthorized sale of the ward's property if the guardian has fully accounted for the proceeds of the sale;⁵ but the mere allowance of the account in which the guardian charged himself with the proceeds of an unauthorized sale of property, nothing appearing to show that such sale was in violation of the order of the court, cannot be construed as a confirmation of the unauthorized act.⁶

Trust enforce-
able against all
who come into
possession of
trust property.

But purchaser
takes a good
title against
the guardian.

Since a fiduciary relation requires vigilance as well as honesty, indifference and carelessness is culpable in a guardian and renders him liable for losses incurred in respect of his ward's money.⁷ "It matters little to an orphan child," says Black, C. J., in *Nicholson's Appeal*,⁸ "whether his interests are sacrificed and his prospects blighted by well-meaning ignorance or by wilful malice. Either is within the definition of misconduct, a word which applies not to motive, but to the act." — "Mere good faith, while requisite and commendable, is not all that is required of such a fiduciary. He must be competent also."⁹

Indifference
and carelessness,
and gross
ignorance, render
guardian
liable.

A guardian acting without the authority of law in reference to

¹ *Adair v. Shaw*, 1 Sch. & Lefr. 243, 262.

² *Carpenter v. McBride*, 3 Fla. 292, 296; *Turner v. Street*, 2 Rand. 404; *Broadus v. Rassen*, 3 Leigh, 12, 27.

³ *Fox v. Kerper*, 51 Ind. 148.

⁴ *Hunter v. Lawrence*, 11 Gratt. 111, 133.

⁵ *Gum v. Swearingen*, 69 Mo. 553, 555.

⁶ *Cox v. Manvel*, 57 N. W. (Minn.) 1062.

⁷ *Royer's Appeal*, 11 Pa. St. 36, 41; *Glover v. Glover*, 1 McMull. Eq. 153; *O'Dell v. Young*, 1 McMull. Eq. 155; *Conant v. Souther*, 80 Wis. 656; *Estate of Webber*, 133 Pa. St. 338.

⁸ 20 Pa. St. 50, 54.

⁹ *Durrett v. Commonwealth*, 90 Ky. 312, 318.

Guardians acting *ultra vires* personally liable.

Order of court without jurisdiction does not protect.

his ward's estate does so at his peril, and is responsible to his ward for any loss that may arise in consequence of the transaction; if it turn out advantageously, the court may adopt it, and then the benefit thereof belongs to the ward; but if otherwise, the loss must be borne by the guardian.¹ Even where the guardian in selling his ward's property acts under order of the Probate Court, if the court had not the legal power to make such order, his sale amounts to a wrongful conversion, and he makes himself liable on his bond for any damage that may result to his ward, or the ward may, at his election, recover the property from the holder, or sue the holder in detinue, or the guardian in trover, and take in satisfaction whichever judgment he likes best.² If a guardian, being insolvent, unjustly distributes property belonging to several of his wards equally, so that one receives an undue share to the disadvantage of another, equity will intervene and divide the property equally, as if it were still in the guardian's hands, notwithstanding his sale to one of the wards exclusively.³

In Louisiana the law protects the interests of minors against the conflicting interests of a natural or dative tutor by the appointment of an undertutor, whose duty it is to act for the minor whenever the interest of the minor is in opposition to the interest of the tutor;⁴ to report to the court any default of the tutor to render his account, oppose the homologation of an account deemed unjust,⁵ and suggest the tutor's removal when necessary.⁶

§ 61. **Guardian's Duty in Respect of his Ward's Real Estate.** — Infants being disabled by the law to manage their real as well as their personal property, it is obvious that guardians are charged with the management and control of the real estate of their wards so long as their office endures. Hence, the right of possession of the ward's real estate is in the guardian.⁷ Though his right to sell be conditioned on the

¹ May v. Duke, 61 Ala. 53, 56; Cheney v. Roodhouse, 135 Ill. 257, 265.

² Hudson v. Helmes, 23 Ala. 585, 590; Beal v. Harmon, 38 Mo. 435, 438.

³ Hampden v. Tremills, 17 Serg. & R. 144, 147.

⁴ Rev. C. C. 1889, Art. 273, 275; Suc-

cession of Meyer, 42 La. An. 634; Chisolm v. Skillman, 2 La. R. 142.

⁵ Bry v. Dowell, 1 Rob. (La.) 111, 112; Succession of Hebert, 4 La. An. 77.

⁶ Lacy v. Lanoux, 19 La. An. 153.

⁷ Bacon v. Taylor, Kirby, 368; Russ v. Old, 6 Rand. 556, 558.

order of a court of competent jurisdiction,¹ he may ^{He may lease it;} lease it² for a period not extending beyond the ward's majority,³ or the age of the ward when the guardian's authority terminates.⁴ There are no implied covenants in a guardian's lease.⁵ If he lease, with the approval of the court and in good faith for a long term, at a less sum than could be obtained from ordinary yearly rental, he is not liable for having failed to secure the higher rent.⁶ But this right belongs only to one who has been regularly appointed and qualified, — the right to manage the real estate does not attach to the natural guardian, or the guardian of the person alone.⁷ The power to lease or rent the real estate makes it the guardian's duty to do so, and for the omission he is ^{is liable for omitting to do so;} liable to the ward for the estimated amount at which it might have been rented.⁸ For the rents paid by the tenants the guardian must account to the ward; if he negligently permit his agent to retain the rents collected, ^{is liable for the rent or rental value;} any loss arising therefrom must be borne by him; the ward is held harmless.⁹ And he is liable to his ward for the reasonable rental value of their lands occupied by himself;¹⁰ although he hold the premises in common with his ward.¹¹ So where he allows the administrator of an estate in which his ward is interested to take charge of the real estate without order of the court to apply the rents for the payment of

¹ *Ante*, § 54; *post*, § 68 *et seq.*

² *Richardson v. Richardson*, 49 Mo. 29, 84; *Granby v. Amherst*, 7 Mass. 1, 6; *Field v. Schieffelin*, 7 Johns. Ch. 150, 154; *Genet v. Tallmadge*, 1 Johns. Ch. 561, 564; *Kinney v. Harrett*, 46 Mich. 87, 89.

³ *Watkins v. Peck*, 13 N. H. 360, 377. In *Ross v. Gill*, 4 Call, 250, 252, a lease extending by its own terms beyond the ward's majority was held void.

⁴ *Snook v. Sutton*, 10 N. J. L. 133. The lease is voidable by another guardian, if it extend beyond the time when the original guardian's authority expires by limitation of the law, as it does in the case of guardianship in socage: *Emerson v. Spicer*, 46 N. Y. 594, 597; *Putnam v. Ritchie*, 6 Paige, 390, 399. See, for case of a lunatic, *Campan v. Shaw*, 15 Mich. 226.

⁵ *Webster v. Conley*, 46 Ill. 13, 16.

⁶ *McElheny v. Musick*, 63 Ill. 328.

⁷ *Magruder v. Peter*, 4 Gill & J. 323, 332; *Darby v. Anderson*, 1 N. & McC. 369, 372; *Ross v. Cobb*, 9 Yerg. 463, 468; *Kinney v. Harrett*, 46 Mich. 87, 89.

⁸ *Jones v. Ward*, 10 Yerg. 160, 168; *Clark v. Burnside*, 15 Ill. 62, 63; *Hughes' Minors' Appeal*, 53 Pa. St. 500, 504; *Coggins v. Flythe*, 113 N. C. 102, 119.

⁹ *Wills's Appeal*, 22 Pa. St. 325, 329.

¹⁰ *Peale v. Thurmond*, 77 Va. 753, 755; *Smith v. Gummere*, 39 N. J. Eq. 27, 33; *Otis v. Strassburger*, 34 Hun, 542; *Cheney v. Roodhouse*, 135 Ill. 257, 267; with legal interest thereon: *Succession of Trosclair*, 34 La. An. 326.

¹¹ *Tyler, in re*, 40 Mo. App. 378, 385, distinguishing the case where the co-tenant occupies a position of trust, from an ordinary co-tenancy; *Harley v. De Witt*, 2 Hill Ch. 367, 370.

debts, he is liable to his ward for the rent up to the time when it is sold to pay debts;¹ and he is liable, also for the difference caused by his negligence between the amount of rent received and the amount which might have been obtained by proper

must keep the
real estate in
good condi-
tion;

diligence.² It is the guardian's duty to keep his ward's real estate in good repair and tenantable condition, if the means in his hands are sufficient for

such purpose; and if in consequence of his negligence in this respect the premises are not rented, he is liable for the loss.³

So if he cultivate his ward's farm, he is bound to do so in the same husband-like manner in which a prudent farmer would cultivate his own farm, or he must make good any loss by depreciation of the property.⁴ He may let out his ward's farm for raising a crop on shares, and in such case the cropper's right is not affected by a subsequent sale of the land under probate license, if the purchaser had notice of the arrangement.⁵ But

cannot lease
lands for min-
ing purposes;

without leave of the court the guardian cannot lease his ward's land for the purpose of its development as oil land, because oil is a mineral, and as such is

part of the realty.⁶ Nor can he permit the cutting and removing

nor permit
waste.

of timber from lands of the ward;⁷ and where he does permit such waste, so that trespass will not lie against the person cutting the timber, the guardian must make compensation to the ward.⁸ But he may sell standing trees, and receive the money in satisfaction of the timber, if no waste is thereby committed.⁹

insure the
premises;

pay taxes;

Besides keeping the buildings of his ward in good repair and tenantable condition, it is the guardian's duty to keep them properly insured,¹⁰ and to pay the taxes and assessments thereon,¹¹ if the estate of the ward is suffi-

¹ *Coggins v. Flythe*, 113 N. C. 102, 118.

² *Knothe v. Kaiser*, 5 Thomp. & C. 4; *Thackray's Appeal*, 75 Pa. St. 132, 137; *Shurtleff v. Rile*, 140 Mass. 213, 214.

³ *Smith v. Gummere*, 39 N. J. Eq. 27, 32; *Irvine v. McDowell*, 4 Dana, 629, 631.

⁴ *Willis v. Fox*, 25 Wis. 646, 649.

⁵ *Weldon v. Lytle*, 53 Mich. 1.

⁶ *Stoughton's Appeal*, 88 Pa. St. 198, 201.

⁷ *Torry v. Black*, 58 N. Y. 185, 189. If such cutting constitute waste: *Bond v. Lockwood*, 33 Ill. 212, 220.

⁸ *Truss v. Old*, 6 Rand. 556.

⁹ *Bond v. Lockwood*, 33 Ill. 212, 220; *Thompson v. Boardman*, 1 Vt. 367, 372.

¹⁰ But the mere omission to insure, in the absence of proof that such omission was culpable carelessness, does not render the guardian liable for subsequent loss by fire: *Means v. Earls*, 15 Ill. App. 273.

¹¹ The guardian is liable to the ward if the property is sold for taxes during the ward's minority: *Shurtleff v. Rile*, 140 Mass. 213. He should pay taxes on the ward's real estate, though it be the duty

cient for that purpose ; and where a minor's property has been sold for unpaid taxes, the minor, or his next friend or guardian, has the undoubted right to redeem.¹ And redeem land sold for taxes; where a guardian holds a mortgage on lands in trust for his ward, the ward's interest in such land will authorize the guardian to redeem it from a tax sale.² But the holder of the tax-title has no right to redeem the lands from a mortgage thereon held in trust for a minor.³

The authority of guardians over the real estate of their wards is in most States regulated by statutes.⁴ If in such States it is provided that leases must be made, or other acts done, under direction of the court, the direction Statutory provisions must be observed. must, it has been held, precede the act, and leases made without such direction are unauthorized.⁵ But a statute authorizing the guardian to lease his ward's real estate upon such terms and for such length of time as the County Court may approve, is construed as validating a lease executed by a guardian in behalf of his ward, unless disapproved by the court.⁶

Dower may be assigned by the guardian of minor heirs to the widow of the deceased owner, and, if ac- Guardian may assign dower. cepted by her, is binding on all the parties ;⁷ because, although a guardian cannot bind his ward by deed, dower may be assigned by parol, and there is a necessity for the guardian's power to assign dower, lest the infant suffer by his indiscretion, or be put to expense if the widow be obliged to resort to process of law.⁸ It is the duty of a guardian to institute proceedings for the assignment of dower, so that his wards may obtain their share of the rents and profits of the estate.⁹ A married woman, guardian of her children, conveying their interests in lands, does not thereby convey her own dower right.¹⁰

That the duty to keep the wards' premises in repair does not extend to the right or duty to make expensive improvements or the erection of new buildings on their lands, has been mentioned before.¹¹

of an administrator to do so, if the latter neglects: *Wright v. Comley*, 14 Ill. App. 551, 554.

¹ *Strang v. Burris*, 61 Iowa, 375.

² *Witt v. Mewhirter*, 57 Iowa, 545, 549.

³ *Witt v. Mewhirter*, *supra*.

⁴ *Muller v. Benner*, 69 Ill. 108.

⁵ *Bates v. Dunham*, 58 Iowa, 308, 311.

⁶ *Field v. Herrick*, 101 Ill. 110, 114.

⁷ *Curtis v. Hobart*, 41 Me. 230.

⁸ *Jones v. Brewer*, 1 Pick. 314, 317; *Young v. Tarbell*, 37 Me. 509, 514; *Boyers v. Newbanks*, 2 Ind. 388, 391.

⁹ *Clark v. Burnside*, 15 Ill. 62; *Mathes v. Bennett*, 21 N. H. 204, 216.

¹⁰ *Jones v. Hollopeter*, 10 Serg. & R. 326, 328.

¹¹ *Ante*, § 54.

The law governing the Sale of Real Estate of Minors is discussed in a separate chapter.¹

§ 62. **Guardian's Duties in Respect of the Ward's Personal Estate.** — The nature of the guardian's title to his ward's prop-

Guardian of an
infant husband
may reduce
the wife's
choses to
possession ;

erty,² his power to convert the same,³ his duty to take it into possession,⁴ as well as his authority to sue, arbitrate, and compromise in respect thereof, are discussed in a previous chapter.⁵ The guardian's duty

to reduce his ward's *choses in action* into possession extends to an infant husband's right to reduce his infant wife's *choses in action* to his possession so as to make them his own, although this, being a marital right, is personal to the husband.⁶

The guardian's right to the custody and management of the ward's property implies the power to collect and receive moneys due the ward, and hence to receipt for the same, and, if secured by mortgage, to discharge

must collect
moneys due
ward ;

the mortgage, whether the money has become due or not.⁷ If the guardian subsequently squander the money, the ward has no

recourse on the former debtor or his assignees.⁸ So he may receive interest in advance of its maturity, and

collect interest
in advance ;

extend the time for payment of the principal,⁹ and sell, transfer,

or assign the mortgage without order of court, unless the statute makes it obligatory to obtain such order.¹⁰

transfer mort-
gages.

But where the statute requires a precedent order of court to authorize the sale of the ward's property, a sale with-

Sale without
order of court,
where statute
requires such
order, is void.

out the order of court conveys no title.¹¹ And so the release of a mortgage and the taking of other inferior security for the money due the ward is a col-

lusive transaction and void ;¹² and the unnecessary and unauthorized foreclosure of a debt well secured by mortgage, involving the sale of the land at a sacrifice, renders the guardian liable for the loss.¹³

¹ *Post*, § 68 *et seq.*

² *Ante*, § 53.

³ *Ante*, § 54.

⁴ *Ante*, § 55.

⁵ § 56, *et seq.*

⁶ The guardian must have this right, because neither the wife, who is under the disability of coverture, nor the ward himself, who is under disability of infancy, can

exercise it: *Ware v. Ware*, 28 Gratt. 670, 674.

⁷ *Chapman v. Tibbits*, 33 N. Y. 289.

⁸ *Riddell v. Vizard*, 35 La. An. 310.

⁹ *Willick v. Taggart*, 17 Hun, 511.

¹⁰ *Humphrey v. Buisson*, 19 Minn. 221.

¹¹ *Mack v. Brammer*, 28 Oh. St. 508, 514.

¹² *Smith v. Dibrell*, 31 Tex. 239, 243.

¹³ *Taylor v. Hite*, 61 Mo. 142, 144.

The possession of personal property of the ward by the guardian is the possession of the ward; hence, stock and farming utensils on a farm carried on by the guardian for the ward are *prima facie* the property of the ward;¹ but such evidence is, of course, rebuttable, and property purchased by the guardian and placed on the land of his ward, does not thereby become the property of the ward, so as to protect it against attachment for the guardian's debts.²

Possession of guardian is possession of ward.

The guardian's power to borrow money in behalf of his ward is limited by the rules, already mentioned, according to which the guardian cannot bind his ward by any contract of his own,³ and that he cannot pledge or mortgage his ward's real estate without the order of a court of competent jurisdiction,⁴ to a very narrow compass. It is unsafe, in any case, to exercise such power without judicial sanction, on statutory authorization; for without such the guardian acts entirely at his peril,⁵ and a mortgage not in exact accordance with the terms of the statute is nugatory and void.⁶ But these principles do not militate against the right of one who has loaned money to a guardian to enable him to remove liens from the ward's lands, to recover therefor in a suit against the guardian;⁷ nor against the right of the guardian to be credited in his account for interest on money advanced by him to pay the debts and expenses of his ward.⁸

Cannot borrow money without order of court;

but loan to remove lien may be recovered, and guardian reimbursed for advances.

It has already been observed, that, like all trustees, guardians are held to the exercise of the utmost good faith, and to such sound discretion, diligence, and intelligence as men of ordinary prudence bring to bear upon their own affairs.⁹ One of the most important duties of trustees, and hence of guardians, is to preserve the trust property intact, and to keep the funds of wards separate from their own.¹⁰ If they are deposited in bank to the credit of the guardian in

Guardians should keep ward's funds separate.

¹ Tenney v. Evans, 11 N. H. 346.

² Tenney v. Evans, 11 N. H. 347.

³ Ante, § 57.

⁴ Ante, § 54.

⁵ United States Mortgage Co. v. Sperry, 24 Fed. R. 838, 843; affirmed in 138 U. S. 313, 325 et seq.

⁶ Merritt v. Simpson, 41 Ill. 391, 393; Mack v. Brammer, 28 Oh. St. 508.

⁷ Ray v. McGinnis, 81 Ind. 451.

⁸ Hayward v. Ellis, 13 Pick. 272, 278.

⁹ Ante, § 60.

¹⁰ Brisbane v. Bank, 4 Watts, 92; White v. Parker, 8 Barb. 48, 53.

Deposit to
guardian's
credit is con-
version.

his own name, it is equivalent to a conversion of them to the guardian's use; for he thereby gains credit with the bank and reaps all the advantages of apparent ownership; interest thereon goes to his own credit; if he fails, the fund is liable to be taken by his creditors for the satisfaction of his debts, and the bank may deduct it from his account for any individual liability of his. Hence, he is liable on his bond to his ward for any loss that may happen in consequence of such deposit, although his balance at the bank may always have equalled the trust fund.¹ And so if he take a note payable to himself individually, without a designation of his official character, he will not be permitted to show, on the failure of the maker of the note, that it was taken for the funds of his ward;² but where

Taking note in
name of guar-
dian not con-
clusive of
conversion.

it is agreed, as a matter of fact, that such notes were given for the money of the wards, and were retained by the guardian, not negotiated nor pledged, nor in any way used in his own business, but clearly identified and traced, the circumstance that the notes were made payable to the guardian personally is not sufficient proof of conversion, and the guardian is not personally liable.³ And if a deposit of the ward's money is made in the name of the guardian, under circumstances showing that he acted *bona fide*, having no account of his own at the bank, declaring it to be trust money, at the time of the deposit, he will not be liable to the wards for a loss, not by the *form* of the deposit, but by the destruction of the currency and banking interests in consequence of the war; and such facts may be proved by parol.⁴

Guardian is
not responsible
for loss by
reason of the
failure of the
bank, unless
culpably
negligent,
or when
stolen.

A guardian is not responsible for the loss of funds occurring by reason of the failure of a bank in which he had deposited the ward's funds, unless by the exercise of reasonable diligence and prudence he might have known it to be in an unsafe condition.⁵ So if the trust fund has been deposited in an iron safe, with the guardian's own money, and is stolen therefrom, the

¹ Jenkins v. Walter, 8 Gill & J. 218, 221; Wren v. Kirton, 11 Ves. 377, 381, referring to Knight v. Plimouth, 3 Atk. 480; Booth v. Wilkinson, 78 Wis. 652; McAllister v. Commonwealth, 30 Pa. St. 536.

² Knowlton v. Bradley, 17 N. H. 458. So of bank-stock taken in the guardian's name: Stanley's Appeal, 8 Pa. St. 431, 435.

³ Brown v. Dunham, 11 Gray, 42. See

Beasley v. Watson, 41 Ala. 234, 239, to same effect, and also holding that the failure of the guardian to report investment of his ward's funds in confederate bonds in his own name did not conclude him, but that he might show the real facts by parol evidence.

⁴ Parsley v. Martin, 77 Va. 376, 383.

⁵ Post's Estate, Myr. 230.

guardian is not liable therefor; and it is not lack of care and diligence that he failed to pursue the thief until after he had discovered the theft.¹ But where a testator bequeathed a part of his estate to his grandchildren, and directed that his son should have the right to become their guardian upon giving bond and good security for the faithful payment of the principal to them on their attaining majority, and no interest on their respective estates, it was held that the testator intended to secure payment of the principal in any event to his grandchildren, and that the guardian, having received the money under the terms of the will, was bound to conform thereto; that he was not bound to pay interest, and any interest received by him for the use of the money was for his own benefit; and that he was liable for any loss of the principal in consequence of loaning it out to make interest.²

§ 63. *Guardian's Duty to invest the Funds of his Ward.* — The investment of the funds of a ward is one of the most important duties of a guardian, requiring not only the most perfect good faith and diligence, but also great circum-
Guardian's duty to invest ward's funds,
 spection and prudence on the part of the guardian, both for his own safety and in the interest of the ward. The object to be accomplished is to so invest that the fund shall be safe, and yield a reasonable rate of income to the ward.³ In the absence of statutory requirements, the guardian must act with good faith and sound discretion; if he
must be exercised with sound discretion and good faith.
 does, he will not be liable for any loss which may happen.⁴ It is a rule of almost universal application to trustees, particularly where infants are concerned, that trust funds should not be loaned on personal security.⁵
Not on personal security.
 The trustee remains liable, in such case, for the securities of the investments until converted into money or some other legal investment, although they had been transferred to a successor in the trust; but if they are paid after the transfer, the former trustee is relieved from responsibility, although the amount

¹ *Atkinson v. Whitehead*, 66 N. C. 296.

² *Walker v. Walker*, 42 Ga. 135, 141.

³ *Perry on Trusts*, § 452; *Emery v. Batchelder*, 78 Me. 233, 241; *King v. Talbot*, 40 N. Y. 76, 84; *Jennings v. Davis*, 5 Dana, 127, 134; *Higgins v. McClure*, 7 Bush, 379.

⁴ *Clark v. Garfield*, 8 Allen, 427; *Lovell v. Minot*, 20 Pick. 116, 119; *Peckham v. Newton*, 15 R. I. 321, 322; *King v.*

Talbot, *supra*; *Cogbill v. Boyd*, 77 Va. 450, 459; *Perkins v. Hollister*, 59 Vt. 348, 349; *Christman v. Wright*, 3 Ired. Eq. 549; *State v. Slevin*, 93 Mo. 253, 260.

⁵ *Gray v. Fox*, 1 N. J. Eq. 259, 270; *Wynne v. Warren*, 2 Heisk. 118, 126; *Smith v. Smith*, 4 Johns. Ch. 281, 284; *Nyce's Estate*, 5 Watts & S. 254, 256; *Clark v. Garfield*, 8 Allen, 427; *Boyett v. Hurst*, 1 Jones Eq. 166, 172.

Nor on real estate situate beyond the jurisdiction, may not be received by the trust estate.¹ The general drift of authority discourages the investment of trust funds on real estate security situated beyond the jurisdiction of the court; and such investments will not be sustained by courts except in presence of clear necessity or a pressing emergency.²

nor on second deeds of trust. Loaning money on second deeds of trust is justifiable only under peculiar circumstances showing clearly the necessity for such course.³ *A fortiori* the guardian is liable to

Guardian is liable for loaning money without security or using it in his own business; make good all losses arising in consequence of loaning the ward's money without any security,⁴ and so it is a breach of duty for a guardian to use the funds of his ward in his own business.⁵ The purchase by the guardian, in his own name, of the property mortgaged to secure the money of his ward, agreeing to pay the debt to the ward as the purchase price, is obviously a conversion of the ward's money, and makes the guardian and his sureties liable to the ward; and if the guardian then release the mortgage to the ward, and give a new mortgage on the land, the ward is not obliged to litigate with the new mortgagee, but may proceed on the guardian's bond for the conversion.⁶

And where the trust funds are employed in trade or speculation, or in a manufacturing establishment, this is a breach of duty;⁷ the guardian will be compelled to make good all losses, and to account for and pay over to the ward all profits, or the ward may elect to hold the guardian liable for interest on the money, but he cannot claim both profit and interest;⁸ and when he elects to take profits he must submit to the losses also.⁹ Investment in bonds of a railroad company has been held improper, such bonds being deemed personal securities.¹⁰

¹ Foster's Will, 15 Hun, 387, 893.

² Ormiston v. Olcott, 84 N. Y. 339, 343.

³ Tuttle v. Gilmore, 36 N. J. Eq. 623; Burwell v. Burwell, 78 Va. 574, 581; Slauter v. Favorite, 107 Ind. 291, 296, referring to Shuey v. Latta, 90 Ind. 136, 139; Monroe v. Osborne, 43 N. J. Eq. 248, 252; Appeal of Lechler, 14 Atl. R. (Pa.) 451, 456.

⁴ Judge v. Mathes, 60 N. H. 433; Wyckoff v. Hulse, 32 N. J. Eq. 697; Clay v. Clay, 3 Metc. (Ky.) 548, 553; Gilbert v. Guptill, 34 Ill. 112, 140; Lee v. Lee, 55

Ala. 590, 598; Estate of Post, 57 Cal. 273.

⁵ Spear v. Spear, 9 Rich. Eq. 184; Simmons v. Logan, reported in 9 Rich. Eq. 184, note (a); Lowry v. State, 64 Ind. 421, 426.

⁶ Hogshead v. State, 120 Ind. 327.

⁷ Tucker v. State, 72 Ind. 242, 247; King v. Talbot, 40 N. Y. 76, 88; Martin v. Raborn, 42 Ala. 648.

⁸ Kyle v. Barnett, 17 Ala. 306, 312.

⁹ Estate of Small, 144 Pa. St. 293, 301, 303.

¹⁰ Allen v. Gaillard, 1 S. C. 279, 282.

A distinction exists between loans made by the guardian of funds in his hands, and simply retaining investments previously made by a former custodian, or by the owner of them; the rule of liability being much more stringent in the former than in the latter case.¹ Thus, where a guardian received from a former guardian three judgment bonds, constituting liens upon the property of the obligor (upon which there were prior liens), in lieu of the money secured by said bonds and belonging to his wards, he was held not liable for loss, although the obligor became insolvent before the maturity of the third bond, and the security turned out to be inadequate by reason of the prior liens; the court considering that the investment had been made by the guardian's predecessor, with special reference to the interest of the ward, being made payable when she became of age, and was such as careful and prudent men would have deemed safe at the time the bonds were assigned to him.² It is not gross and culpable carelessness for a guardian to leave money in hands in which the family and neighbors thought it safe.³

Where a guardian receives stocks as the property of his ward, he must hold and account for them as a trust; and if he dispose of them, then at the highest price received by him, or that might have been received by him, as well as all the dividends realized therefrom.⁴ But if he invest his ward's money in unproductive stocks, he must himself bear the loss, if any; the ward is not obliged to take them from the guardian.⁵

It is obvious, that the investment should be made as soon as the guardian can find a suitable opportunity therefor, and in this respect, also, diligence and good faith are demanded, independently of any statutory provision.⁶ He should not suffer the funds to lie idle longer than he is obliged to, with due regard to the safety of the fund. It will appear later on, that the guardian is liable to pay interest on funds that he negligently permits to remain uninvested.⁷ Courts

¹ Appeal of Lechler, 14 Atl. (Pa.) 451, 457.

² Jack's Appeal, 94 Pa. St. 367, 370.

³ Huffer's Appeal, 2 Grant's Cas. 341, 344.

⁴ French v. Currier, 47 N. H. 88, 98; Lamb's Appeal, 58 Pa. St. 142, 146.

⁵ Kimball v. Reding, 31 N. H. 352, 371; French v. Currier, *supra*.

⁶ Owen v. Peebles, 42 Ala. 338, 341. In Illinois a guardian was held liable for neglecting to invest his ward's money, from the expiration of sixty days from the receipt of the funds: Rawson v. Corbett, 43 Ill. App. 127, 141.

⁷ *Post*, § 67.

within six months, or a year. sometimes fix a period, during which the guardian is not held liable for neglect in failing to invest,¹ generally six months,² or even a year;³ and where expenses are to be met out of the fund, a reasonable amount must be allowed to remain in the guardian's hands without being liable for interest thereon;⁴ and he should not be required to loan out a sum so small that a prudent person would not seek an investment for it.⁵

A distinction is drawn between a temporary deposit of the ward's money for safe keeping, subject to the demand of the depositor, which case constitutes an exception to the general rule making trustees liable for the loss of trust funds invested on personal security, and a loan constituting an investment of the ward's funds. In the former case, if the deposit be temporary, in a bank of good repute, while seeking an investment for the fund, and in the name of the trust estate, unmixed with the guardian's own fund, the loss, if the bank fail, will fall on the estate, and not on the guardian.⁶ But if he deposit the fund in his own name, the loss, if the bank fail, will fall on him;⁷ so if he invests the fund with a private banker, without order of court.⁸

In England the rule, it is held in a number of cases, has long been settled, that a trustee holding funds to invest for the benefit of a minor ward is bound to make such investment in the public debt, for the safety whereof the faith of their government stands pledged; or in loans for which real estate is pledged as security. And this, although the terms of the trust commit the investment, in general terms, to the discretion of the trustee; the discretion is to be exercised within these limits.⁹ But as this rule rests upon the special policy of Eng-

¹ *Karr v. Karr*, 6 Dana, 3, 5.

² *Worrell's Appeal*, 23 Pa. St. 44, 50; *White v. Parker*, 8 Barb. 48, 73; *Duncomb v. Duncomb*, 1 Johns. Ch. 508, 511; *Hooper v. Royster*, 1 Munf. 119, 132; *Bond v. Lockwood*, 33 Ill. 212, 221; *Crosby v. Merriam*, 31 Minn. 342; *Huffer's Appeal*, 2 Grant's Cas. 341, 344; *Armstrong v. Walkup*, 12 Gratt. 608, 613.

³ *Pettus v. Sutton*, 10 Rich. Eq. 356.

⁴ *Baker v. Richards*, 8 Serg. & R. 12, 15; *Knowlton v. Bradley*, 17 N. H. 458; 460.

⁵ *Knowlton v. Bradley*, *supra*. "A less sum than \$100 could not be conveniently let out, and therefore, unless that sum was on hand, there was no negligence in not letting it out:" *Baker v. Richards*, 8 Serg. & R. 12, 16.

⁶ *Law's Estate*, 144 Pa. St. 499, 505.

⁷ *Commonwealth v. McAlister*, 28 Pa. St. 480; *Mulholland's Estate*, 34 Atl. (Pa.) 735.

⁸ *Baer's Appeal*, 127 Pa. St. 360, 363.

⁹ *Woodruff, J.*, in *King v. Talbot*, 40 N. Y. 76, 83.

land, is not found in the common law, and had no ap-
plication to this country in its colonial state, it has
not been incorporated into our law. It is applicable only in so
far as it announces fundamental principles of equity, commend-
ing themselves to the conscience and suited to the condition of
our affairs.¹ By act of Parliament, known as Lord
St. Leonard's Act,² and the amendment thereto,³
courts of chancery were authorized to issue general orders as to
the investment of funds subject to their jurisdiction, according to
which trustees were authorized to invest in the securities thus
designated. The policy announced by the English chancellors⁴
thus received legislative sanction. Before the late rebellion the
condition of the United States, and of most of the States com-
posing them, was different; there was no necessity or
policy requiring a compulsory investment of trust
funds in public securities.⁵ Hence the English rule
had no application here, and investments by guar-
dians on securities different from those required in England
were upheld by courts, when not in contravention of statutory
requirements or objectionable on other grounds.⁶

Not applicable
in America.

English stat-
ute.

Different
securities sanc-
tioned in U. S.
before the late
war.

In the absence of statutory directions touching the investment
of wards' funds it has been held that the guardian should, to ex-
onerate himself from liability for interest, and for losses without
subsequent neglect, apply to the Probate Court for directions
touching the investment.⁷

§ 64. **Statutory Provisions touching the Investment of Funds.** —
The War of the Rebellion brought about a change in the financial

¹ King v. Talbot, *supra*. To same effect: Brown v. Wright, 39 Ga. 96, 99.

² 22 & 23 Vict. ch. 35, § 32.

³ 23 & 24 Vict. ch. 38, §§ 10, 11. By the 12th section of this chapter the above act was made retroactive.

⁴ "The debt of England is immense," says Brown, C. J., in Brown v. Wright, *supra*, "and in order to sustain the public credit, it has been necessary to create, as far as possible, a demand for the public securities. Hence sprung the rule of the English chancery, requiring all trust funds, not secured by real estate, to be invested in them."

⁵ "... In the first place, the stocks depending on the promise of the govern-

ment, or, as they are called, the public funds, are exceedingly limited in amount, . . . and, in the second place, . . . there is one consideration much in favor of investing in the stock of private corporations. They are amenable to the law. The holder may pursue his legal remedy and compel them or their officers to do justice. But the government can only be supplicated." Harvard College v. Amory, 9 Pick. 446, 460.

⁶ Shaw, C. J., in Lovell v. Minot, 20 Pick. 116, 119; Kinmouth v. Brigham, 5 Allen, 270, 277. And see, on this subject, Woerner on American L. of Adm. § 336, p. 706.

⁷ Bryant v. Craig, 12 Ala. 354, 359.

Change of
conditions
since the war.

curities.¹

No longer im-
possible to
invest trust
funds in public
securities.

Statutory
directions for
investments.

condition of the country, which suggested the adoption of the policy long prevalent in England, of inviting the investment of trust funds in State securities.¹ There is no longer such scarcity of government securities as to make it impossible to invest the trust funds of the country in this manner, as Perry, in the fourth edition of his work on Trusts and Trustees, points out.² "There are now national, state, county, town, and city bonds in sufficient amounts to absorb all trust funds seeking investment, and it is not to be denied that such investments are more permanent and safe."³ It is accordingly provided by statute that guardians may invest the funds of their wards in the funded debt or bonds of the United States, in Arkansas,⁴ Delaware,⁵ Florida,⁶ Illinois,⁷ Kentucky,⁸ Minnesota,⁹ New Hampshire,¹⁰ North Carolina,¹¹ Pennsylvania,¹² Rhode Island,¹³ Tennessee,¹⁴ and Texas;¹⁵ in the bonds, stocks, and other securities of the State of the forum, in Delaware,¹⁶ Georgia,¹⁷ Kentucky,¹⁸ Louisiana,¹⁹ Minnesota,²⁰ New Hampshire,²¹ Pennsylvania,²² Rhode

¹ "The policy of the State at the time of the adoption of the Code," says Chief Justice Brown, in *Brown v. Wright*, 39 Ga. 96, 99, "seems to have changed. The expenses then being incurred in the prosecution of the war were heavy, and the debt which our people then expected to pay was increasing, and it became an object to have trust funds invested in State securities; and all other investments were declared to be at the risk of the trustee. . . ."

² Perry on Trusts, § 456.

³ *Ib.*, p. 573 (4th Ed.).

⁴ St. 1894, § 3620 (temporarily, until other opportunity offer).

⁵ Rev. St. 1874, p. 579.

⁶ Rev. St. 1892, § 2095.

⁷ St. & Curt. Ann. St. Supp. 1892, ch. 64, ¶ 22.

⁸ Gen. St. 1887, ch. 48, Art. II. § 19. But this statute is held not to exclude other investments; the guardian may, in a prudent manner, loan out the ward's money on solvent personal security: *Durrett v. Commonwealth*, 90 Ky. 312, 319. (This section seems to have been repealed,

and is replaced in St. of 1894 by § 4706, which provides for investments "regarded by prudent business men as safe investments.")

⁹ St. 1891, § 5776.

¹⁰ Publ. St. 1891, ch. 178, § 9.

¹¹ Code, 1883, § 1594. It was held in this State, that a court of equity will not control the discretion of a guardian in the investment of his ward's property, being in the guardian's discretion and on his responsibility: *Gary v. Cannons*, 3 Ired. Eq. 64, 69.

¹² Bright. Purd. Dig. p. 527, § 101.

¹³ Publ. St. 1882, p. 434, § 38.

¹⁴ Code, 1884, § 3385.

¹⁵ Rev. Civ. St. 1888, Art. 2558.

¹⁶ Rev. St. 1874, p. 579.

¹⁷ Code, 1882, § 1833.

¹⁸ Gen. St. 1887, ch. 48, Art. II. § 19. Omitted in St. 1894, enacting § 4706 in lieu thereof, providing as in note 8, *supra*.

¹⁹ Rev. Civ. Code, 1888.

²⁰ St. 1891, § 5776.

²¹ Publ. St. 1891, ch. 178, § 9.

²² Bright. Purd. Dig. 1885, p. 527, § 101.

Island,¹ South Carolina,² Tennessee,³ and Texas;⁴ in county, city, or town bonds in Illinois,⁵ Kentucky,⁶ Minnesota,⁷ Pennsylvania,⁸ and Rhode Island.⁹ Quite a number of States make it obligatory on guardians to exercise their best judgment, without indicating any particular mode of investment, if they cannot invest in real estate security, as in Alabama;¹⁰ or if they invest without taking an order of court, as in California,¹¹ Idaho,¹² Michigan,¹³ Nevada,¹⁴ and Utah;¹⁵ in others, the statute requires them to invest under order of court only, without prescribing any class of securities, as in Indiana,¹⁶ Iowa,¹⁷ Maine,¹⁸ Mississippi,¹⁹ Nebraska,²⁰ New Jersey,²¹ New Mexico,²² Oregon,²³ Washington,²⁴ and Wisconsin.²⁵ In Colorado,²⁶ and Vermont,²⁷ guardians must invest the ward's money on real estate security; in Arkansas,²⁸ Illinois,²⁹ Maryland,³⁰ New Hampshire,³¹ the mortgage securing notes given for loans of the funds of wards are required to be on unencumbered real estate worth at least double the amount of the loan, in Texas³² the full amount, with interest. In many States, courts are given power to authorize investments in particular classes of securities, *or* in such manner as the court may approve; so, substantially, in Alabama, Delaware, Florida, Illinois, Maine, Maryland, Oregon, and Wisconsin; but in New Hampshire the statute prohibits investment in any other way than it points out. The constitution of Pennsylvania prohibits the legislature from authorizing the invest-

Power of courts to direct investments.

¹ Publ. St. p. 434, § 38.

² Rev. St. 1873, p. 130, § 97.

³ Code, 1884, § 3384.

⁴ Rev. Civ. St. Art. 2558.

⁵ St. & Curt. Supp. 1892, ch. 64, ¶ 22.

⁶ Gen. St. 1887, ch. 48, Art. II. § 19. This section is replaced by § 4706, Rev. St. 1894, prohibiting such investments under certain special circumstances.

⁷ St. 1891, § 5776.

⁸ Bright. Purd. Dig. p. 527, § 102.

⁹ Publ. St. 1882, p. 434, § 38.

¹⁰ Code, 1886, § 2412.

¹¹ 3 Deer. Code & St. 1885, § 1780.

¹² Rev. St. 1887, § 5800.

¹³ Gen. St. 1882, § 6083. Except that in this State the statute expressly allows guardians, under order of the Probate Court, to subscribe for their wards to stock in co-operative savings companies: Gen. St. 1882, § 3965.

¹⁴ Gen. St. 1885, § 570.

¹⁵ Comp. L. 1888, § 4334.

¹⁶ Rev. St. 1894, § 2686.

¹⁷ So held (*arguendo*) in *Bates v. Dunham*, 58 Iowa, 308, 310.

¹⁸ Rev. St. 1884, ch. 67, § 19.

¹⁹ Ann. Code, 1892, § 2203.

²⁰ Comp. St. 1891, p. 497, § 27.

²¹ Rev. 1877, p. 482.

²² Comp. L. 1884.

²³ Gen. L. 1887, p. 1331, § 2899.

²⁴ 2 Gen. St. & C. 1891, § 1139.

²⁵ Ann. St. 1889, § 3986.

²⁶ Ann. St. 1891, § 2081.

²⁷ St. 1894, § 2780.

²⁸ Dig. 1894, § 3618.

²⁹ St. & Curt. Suppl. 1892, p. 674.

³⁰ Pub. Gen. L. 1888, Art. 93, § 171.

³¹ Publ. St. 1891, ch. 178, § 9.

³² Rev. St. 1895, Art. 2640.

ment of trust funds in the bonds or stocks of any private corporation.

The duties of guardians in the disposition of the funds of their wards are pointed out with great minuteness in the statutes of some of the States. Thus, the investment of minors' funds in Louisiana are required to be by public act, secured by mortgage, unless made under order of court, in bonds of the State of Louisiana, or which the State has guaranteed; such bonds can neither be exchanged nor sold without the decree of court, and must be registered with the Auditor of Public Accounts to the credit of the ward, and made non-negotiable.¹

In Illinois the investment must be made with the approval of the court; if in bonds of any city or county, they must be such as were not issued in aid of any railroad, and of such cities or counties as are not permitted by law to incur any indebtedness exceeding in amount five per cent. of the assessed value of its taxable property, and whose total indebtedness does not exceed that amount at the time of the investment. Loans on real estate must be secured by first mortgage, and not exceed one-half the value thereof. They shall not be for longer than three years, nor for a time beyond the ward's minority. Personal security may be taken for sums not exceeding one hundred dollars; but if the guardian permits money to lie idle after he has an opportunity to invest the same, he becomes liable for interest.² In this State it has been held, that a guardian is not liable for an error in judgment in making investments of his ward's money, when he acts in good faith, and is under the circumstances reasonably prudent; he is not bound to exercise the highest degree of care; and also, that it is not necessary that a guardian should have the approval of the court in making the loan; but in such case, if a loss ensues, he will be held to show clearly, and beyond a reasonable doubt, that the loss did not occur on account of the want of good business judgment.³ But in later cases decided by the Supreme Court the doctrine is announced that a loan without approval by the court is at the guardian's personal risk.⁴

¹ Rev. Civ. Code, 1888.

² St. & Curt. Suppl. 1892, p. 674, ¶ 22.

³ Hughes v. People, 10 Ill. App. 148, Pillsbury, J., dissenting on the ground that a guardian is personally liable for

any loss in case of a loan without the sanction of the court: p. 158.

⁴ McIntyre v. People, 103 Ill. 142, 147; Hughes v. People, 111 Ill. 457; Winslow v. People, 117 Ill. 152.

In Arkansas¹ and Missouri² guardians are required to loan out the money of their wards at the highest legal rate of interest that can be obtained on prime real estate security;³ and it is made the duty of the court to require every guardian, at every annual settlement, to report what disposition he has made of his ward's money; if loaned out, then the name, also, of the person to whom loaned, the description of the real estate security, where situate, and its value.⁴ This report must be under oath and filed in the court; and the court must examine the same as soon as made, and if in its opinion the security is insufficient, require sufficient additional security to be given to protect the ward, and if not given within ten days, it is the duty of the guardian to institute suit to recover the amount. But if not loaned out, then, in Missouri, the guardian shall state the reason under oath, and shall also state that he has been unable, after diligent effort, to loan out the money; but in Arkansas, the court shall order the investment of the money in United States bonds, until further order of the court. In Missouri, the guardian may, under order of court, apply his ward's funds in the improvement of his real estate; and may take personal security on loans not exceeding three hundred dollars.

Arkansas and
Missouri.

Duty of guar-
dian to report
investment.

In Florida the court may authorize a guardian to retain the money of his ward in his own hands and pay interest thereon; and if no investment is feasible on sufficient security, the guardian is liable for the principal only.⁵

In Florida.

Where a guardian obtains an order of court to invest funds based upon an insufficient or misleading statement of the circumstances in connection therewith, the court will, on proof of the facts, vacate its order, and hold the guardian liable for the money with interest.⁶

§ 65. *Investment in Confederate Securities.* — The investment of trust funds in the bonds and securities of the Confederacy during the civil war has given rise to numerous adjudications. During the first years following the collapse of the Confederate government

¹ St. 1894, § 3618.

² Rev. St. 1889, § 5318.

³ In Arkansas unencumbered real estate other than the homestead, and not more than one-half the value of the security.

⁴ Similar provisions exist elsewhere; see, for instance, New Hampshire Publ. St. 1891, ch. 178, § 10.

⁵ Rev. St. 1892, § 2095.

⁶ Matter of Grandstrand, 49 Minn. 438.

the Federal courts inclined to the view, that since the practical severance of the seceded States from the United States was treasonable and void in law, the legal relations between the former and the latter were never changed; that while the legislative and executive departments of the government might, following the practice of modern nations in this respect, concede to participants in a formidable rebellion the status of belligerents, recognizing their *de facto* government, yet courts can only declare the law; from which it follows that no legal rights were, or could have been, created or defeated by the action of the government of the Confederacy, or of any Confederate State.¹

Law providing for investment in Confederate securities held void.

In a case decided by Chief Justice Chase, the principle is discussed upon which a party is excused from liability for a loss occasioned by *vis major*, or irresistible force; and a distinction drawn between such cases and obedience to a void law or illegal act without resistance or protest.² The Supreme Court of the United States also distinguish between a contract based on Confederate treasury-notes, which is held valid,³ and a contract based upon bonds issued by the State of Arkansas in aid of the rebellion, which is held invalid.⁴ In the reconstructed States, some of the courts, notably the judges holding office under commissions dating from Confederate authority, but continued in office under military regime, held that the investment of funds in the hands of trustees, as authorized by the statutes of the Confederacy and of Confederate States protect the trustees;⁵ but their successors, holding office under the reconstruction by Congress, held that such acts being void, they can afford no legal justification to the trustees, and that they were liable for the money so invested to the *cestui que trustent*.⁶

Loans under Confederate laws held proper;

by other courts held objectionable, as being in aid of the Rebellion.

The United States Supreme Court distinguishes between obedi-

¹ Shortridge v. Macon, Chase's Dec. 136, in which Chief Justice Chase held that the compulsory payment of a debt to a receiver under the Sequestration Acts of the Confederate government is no defence to a suit brought on such debt by the creditor. To similar effect: Keppel v. Petersburg R. R., Chase's Dec. 167.

² Keppel v. Petersburg R. R., Chase's Dec. *supra*, p. 209; to same effect: Head v. Starke, Chase's Dec. 312, 315.

³ Thorington v. Smith, 8 Wall. 1, 7.

⁴ Hanauer v. Woodruff, 15 Wall. 439, 442.

⁵ Powell v. Boon, 43 Ala. 459, 468; Watson v. Stone, 40 Ala. 451, 463; Myers v. Zetelle, 21 Gratt. 733, 753; Trotter v. Trotter, 40 Miss. 704, 710 (reversed in Bailey v. Fitzgerald, 56 Miss. 578, 589); Brown v. Wright, 39 Ga. 96, 101; Tarpley v. McWhorter, 56 Ga. 410, 412.

⁶ Powell v. Boon, *supra*, p. 469, *et seq.*; Hall v. Hall, 43 Ala. 488, 496.

ence to such laws of the Confederate States as were necessary for the protection of property and personal rights, and the existence of organized society, which must be respected in their administration under whatever temporary dominant authority exercised, and the giving or intending to give aid and comfort to the rebellion under color of such laws, which constitutes treason and avoids such acts.¹ The investment in bonds of the Confederate States was held to be a direct contribution to the resources of the Confederate government, which no legislation of a Confederate State, no decree of the Confederate government, and no judgment of its tribunals could make lawful; the decree of a probate court approving such investment is void,² the statutes directing such judgment being unconstitutional and of no effect.³

The voluntary investment in Confederate bonds was held improper, and the trustee so investing liable for accruing loss, on the ground, also, of *laches*, or breach of duty;⁴ and conversely, that where the bonds were not purchased directly from the Confederate government, but were bought in open market, so that it cannot be said that the transaction constituted a loan in aid of the rebellion, and where they were paid for in Confederate currency, itself of no greater value than the bonds, so that no loss accrued to the beneficiary, the trustee is not liable.⁵

And on the ground of carelessness,

not liable for purchase of bonds in open market.

It was held in Virginia,⁶ followed in West Virginia,⁷ that to authorize an investment under the Virginia act in Confederate bonds, there must be a concurrence of three conditions: (1) The money must be in the hands of the fiduciary; (2) in the due exer-

¹ Hence a purchaser of cotton from the Confederate States, knowing that the money he paid for it went to sustain the rebellion, cannot recover proceeds of the sale of such cotton: *Sprott v. U. S.*, 20 Wall. 459.

² *Horn v. Lockhart*, 17 Wall. 570, 580; *Alexander v. Bryan*, 110 U. S. 414, 419; *Lamar v. Micon*, 112 U. S. 452, 476.

³ So declared by the highest tribunals of the States themselves: *Houston v. Deloach*, 43 Ala. 364, 371; *Powell v. Boon*, 43 Ala. 459, 469; *Bailey v. Fitzgerald*, 56 Miss. 578, affirmed in *Fitzgerald v. Bailey*, 58 Miss. 658; *Cole v. Cole*, 28 Gratt. 365, 368, citing earlier Virginia cases.

⁴ *Creighton v. Pringle*, 3 S. C. 77, 96;

Cureton v. Watson, 3 S. C. 451, 458; *State v. Simpson*, 65 N. C. 497; *Beery v. Irick*, 22 Gratt. 614, 622.

⁵ *Hinton v. Kennedy*, 3 S. C. 459, 490; *Campbell v. Campbell*, 22 Gratt. 649, 684; if the guardian acts in good faith, having invested his own money in the same way, and taken the advice of experienced business men, after due effort to invest in private loans: *Robertson v. Wall*, 85 N. C. 283, 287.

⁶ *Crickard v. Crickard*, 25 Gratt. 410, 421.

⁷ *McClure v. Johnson*, 14 W. Va. 432, 448; *Knight v. Watts*, 26 W. Va. 175, 210.

cise of his trust, (3) and inability to pay over to the party entitled. And if they do not co-exist, the order of the court or judge is null, and the fiduciary is responsible for the money.

§ 66. **Adjudications on Statutory Provisions touching Investments.**

Guardians not liable for losses on loans made in good faith and with due diligence in the manner pointed out by statute. — If the guardian acts with due diligence and fidelity in the discharge of the duty imposed upon him, and proceeds in the manner pointed out by the statute, he is not to be held liable for injury or loss accruing to the beneficiary.¹ If he take a note with sufficient sureties for money of the ward loaned out

by him, and resigns before the note is due, he cannot be held for loss occurring afterward.² But where the guardian makes loans

Loans in disregard of the statutes are at the guardian's peril. in disregard of the statute, he does so at his peril; he cannot, in such case, exonerate himself by showing that he acted in good faith, or that the security was good when taken.³ Where the statute requires in-

vestments to be made under the sanction of the court, any loss arising in consequence of an investment made without such sanction is chargeable to the guardian and not to the ward;⁴ and such investment is not valid against creditors of the guardian, although it be acquiesced in by the ward.⁵ So, if the Probate Court direct an administrator to retain a sum of money on executing a bond to the guardian of an infant distributee, with the consent of the guardian, such order is a rightful exercise of the power of the court to order investment of a ward's funds, and compliance with its terms will be binding on guardian and ward.⁶ And where the statute requires mortgage security on loans, the

¹ *Newman v. Reed*, 50 Ala. 297; *Brown v. Wright*, 39 Ga. 96, 101; *Nelms v. Summers*, 54 Ga. 605; *Ashley v. Martin*, 50 Ala. 537, 540; *Haddock v. Planters' Bank*, 66 Ga. 496; *Watson v. Holton*, 115 N. C. 36.

² *Newman v. Reed*, *supra*.

³ *Hughes v. People*, 111 Ill. 457, 460; *Winslow v. People*, 117 Ill. 152, 159; *May v. Duke*, 61 Ala. 53, 57; *Guardianship of Cardwell*, 55 Cal. 137, 141.

⁴ *May v. May*, 19 Fla. 373, 387; *Carlyle v. Carlyle*, 10 Md. 440, 447. But see *Hughes v. People*, 10 Ill. App. 148, in which the majority of the court hold that where the guardian loans his ward's

money without the sanction of the Probate (County) Court, as required by the statute, he is required to show clearly and beyond reasonable doubt, that the loss did not occur on account of the want of good business judgment. In the later case of *McIntyre v. People*, 103 Ill. 142, 147, the Supreme Court affirm the doctrine announced in the text; and this is affirmed in several subsequent cases, among them the appeal from the above case of the Ill. App. Court, reported in 111 Ill. 457.

⁵ *Davis v. Harris*, 13 Sm. & M. 9.

⁶ *O'Hara v. Shepherd*, 3 Md. Ch. 306, 317.

guardian becomes personally liable if he takes personal security.¹ So where the statute enumerates certain securities which trustees are permitted to take for the loan of trust funds, and directs that any other investment must be made under the order of court, "or else at the risk of the trustee," a guardian is liable for all loss in consequence of an investment not sanctioned by the court, while investment in the securities authorized would have protected the guardian, although entirely worthless.² Where a statute requires a guardian, to make affidavit that the funds which he has invested are, and were, the same kind of funds received by him, he is, in the absence of such affidavit, liable for losses in consequence of the investment, unless he affirmatively prove, on trial, the facts required to be shown.³

It is self-evident that an order of the court to invest a ward's funds, obtained by fraud, is void; it has been held that such an order may be impeached collaterally,⁴ and a charge of fraud is sufficient to sustain a bill seeking to avoid a deed conveying land to the ward, on the ground of fraudulent collusion between the guardian and vendor.⁵ So the order of court is no protection to the guardian, unless it be authorized by statute;⁶ and it must be in writing, — a merely verbal order is not sufficient, nor can it be proved by parol.⁷

Order obtained by fraud is void.

Order not based on statute is void.

The statute of Texas which declares a guardian liable for the principal and legal interest of his ward's estate which he fails to invest, if he could have done so by exercising reasonable diligence, is held to be mandatory and imperative, and the guardian liable, for failure to comply with it, for interest at the highest legal rate compounded.⁸

Statutory provision held mandatory.

In Kentucky, whose statute provides that courts of equity *may*, on the petition of a guardian or ward, cause the estate to be invested under its direction, it is held that an order directing such investment, not in terms requiring *all* the estate to be so invested, does not take

Right to invest under general law not inconsistent with an order under a special statute.

¹ Moore v. Hamilton, 4 Fla. 112, 118; Moore v. Felkel, 7 Fla. 44, 60.

² Brown v. Wright, 39 Ga. 96, 101.

³ McWhorter v. Tarpley, 54 Ga. 291. To same effect: King v. Hughes, 52 Ga. 600, 604; Johnson v. McCullough, 59 Ga. 212, 228.

⁴ Skelton v. Ordinary, 32 Ga. 266, 271.

⁵ Callaway v. Bridges, 79 Ga. 753, 757.

⁶ Per Lyon, J., in Skelton v. Ordinary, *supra*.

⁷ Carlisle v. Carlisle, 10 Md. 440, 447; Sherry v. Sansberry, 3 Ind. 320, 324.

⁸ Smythe v. Lumpkin, 62 Tex. 242, 244.

from the guardian his power of investment under the general law, independent of such order;¹ and that a trustee may invest and reinvest the trust fund in such interest-bearing or dividend-paying securities as a prudent business man would select for the purpose of securing his own money and obtaining an income from it, without the cost and delay of applying to the Chancellor for advice.²

§ 67. **The Guardian's Liability for Interest.** — As already intimated,³ a guardian should not suffer funds of his ward to lie idle; it is his duty, as soon as opportunity offers, to invest them. This duty he must perform, like all others pertaining to his office,

Gain, profit, or increase of ward's funds belongs to the ward. with the utmost good faith, and with that degree of diligence and prudence which a man of ordinary business capacity brings to bear upon his own affairs.

To this extent he will be held liable by courts, the fundamental rule being applied in all cases, that whatever of gain or profit may flow from the employment of the ward's funds shall never enure to the benefit of the guardian, but must be faithfully secured to the ward.

For the simple neglect of the duty to invest, the guardian is liable to his ward (as any other trustee would be to his *cestui que trust*) for such rate of interest as the law, in the absence of special agreement, allows to a creditor from his debtor on ordinary debts;⁴ although the omission arose from a mistaken notion that it was the guardian's duty to pay the funds to the ward's mother.⁵ This liability does not, of course, attach if it be shown that the guardian could not,

Only if investment was feasible. Guardian has reasonable time to invest, with reasonable diligence, loan out his ward's money with safety, and that he in no wise himself used or obtained any profit from the same.⁶ So the guardian must be allowed a reasonable time within which to effect a safe investment;⁷ but if he make himself liable for

¹ Durrett v. Commonwealth, 90 Ky. 312, 319.

² Fidelity Trust Co. v. Glover, 90 Ky. 355.

³ Ante, § 63.

⁴ In re Thurston, 57 Wis. 104, 107; Olsen v. Thompson, 77 Wis. 666, 672; Brand v. Abbott, 42 Ala. 499, 501; Stark v. Gamble, 43 N. H. 465, 468; Boynton v. Dyer, 18 Pick. 1; Bennett v. Hanifin, 87 Ill. 31, 36; Stumph v. Pfeiffer, 58 Ind.

472; Fox v. Wilcocks, 1 Bin. 194, 199; Light's Appeal, 24 Pa. St. 180, 181.

⁵ Taylor v. Hill, 87 Wis. 669, 671.

⁶ Brand v. Abbott, 42 Ala. 499, 501; Ashley v. Martin, 50 Ala. 537, holding that courts will take judicial notice of the condition of the country rendering it impracticable for a guardian to make safe loans, p. 541.

⁷ See, as to the time allowed for investments, ante, § 63.

negligence in investing, he is chargeable with the interest from the day on which he received the fund, not from the end of the time allowed by the law within which to invest.¹ Since the guardian must necessarily judge at what time it is reasonable and practicable to loan out the money, he should not be made to suffer for any mistake made in the honest discharge of his duty, provided he act as a man of common prudence.²

but if negligent, is liable for interest from day he received the fund.
Not liable for mistake in honest discharge of duty.

The guardian's liability for simple interest at the legal rate does not, of course, enable him to retain any excess over that rate that he may have actually realized, in any way, out of his ward's funds. Where it is shown that the guardian has made more than the ordinary or legal rate, he will be charged all that he has made out of the ward's estate.³ In Missouri the guardian is required by statute to loan out his ward's funds "at the highest legal rate," he can obtain on prime real estate security.⁴ It has already been mentioned, on several occasions, that the law will never sanction any transaction by which the guardian shall take advantage out of his official relation to his ward. The simple interest at the legal rate is but the compensation exacted by the law from a guardian in favor of his ward, for the loss suffered by the latter in consequence of the guardian's dereliction of duty. Hence, if a guardian, or other trustee, refuses or neglects to account for any interest on funds in his hands, he will be treated as if he had used the funds himself, and will be charged with interest accordingly,⁵ which may be at a higher rate, or compounded, as will be noticed below. But the direction of a statute requiring guardians to loan out their wards' moneys, to collect the interest annually, and to compound the interest on all debts due the guardian (from a certain date) is not to be construed as requiring compound interest on the money of the wards in his hands;⁶ nor does the mere omission to make the statutory annual settlements authorize the charge of compound interest on the funds.⁷

But liable for all he may realize out of fund.

Failing to invest, guardian is liable as if he had used the fund himself.

Not necessarily liable for compound interest.

¹ *Snavely v. Harkrader*, 29 Gratt. 112.

² *Ashley v. Martin*, 50 Ala. 537, 541.

³ *Foteaux v. Lepage*, 6 Iowa, 123, 135.

⁴ Rev. St. Mo. 1889, § 5318; *Frost v. Winston*, 32 Mo. 489.

⁵ *Comegys v. State*, 10 Gill & J., 175,

185. To same effect: *Moore v. Beauchamp*, 5 Dana, 70, 77; *Evertson v. Tappen*, 5 Johns. Ch. 497, 517.

⁶ *Tyson v. Sanderson*, 45 Ala. 364, 368; *Brand v. Abbott*, 42 Ala. 499, 500.

⁷ *Bryant v. Craig*, 12 Ala. 354, 358; *Childress v. Childress*, 49 Ala. 237, 239.

Probate courts may be without authority to adjudicate on the question of the guardian's liability for neglecting to invest his ward's funds, unless he has been directed to loan out or take the money at interest; in such case he cannot be charged with interest by that court, but will be liable in another.¹

If the neglect to invest has been gross and wilful, and, *a fortiori*, if the funds have been used by the trustee in his own business, or if profits have been made of which no account is given, courts have sometimes compounded the interest, as a punishment, or as a measure of damage for undisclosed profits, and in place of them.² On this theory interest has been compounded at the highest legal rate, with biennial,³ annual,⁴ or even semi-annual⁵ rests. The theory of punishment has not, however, found general favor. "Considerations of this character are out of place in a court of equity, and they are not generally approved at the present day," says Martin, C., in *Cruce v. Cruce*,⁶ passing upon the liability of an executor having used trust funds in his own business.⁷ And Parker, C. J., says: "Such interest is allowed in equity, as is just and reasonable."⁸ "Compound interest cannot be allowed, save in very peculiar cases;"⁹ "not with the view to punish, but with a view to reach the profits."¹⁰

¹ *Austin v. Lamar*, 23 Miss. 189, 192; *Hendricks v. Huddleston*, 5 Sm. & M. 422, 427; *Reynolds v. Walker*, 29 Miss. 250, 262, reversing, *pro tanto*, *Brown v. Mullins*, 24 Miss. 204, 206.

² Per Grier, J., pronouncing the opinion of the United States Supreme Court in the case of *Barney v. Saunders*, 16 How. (U. S.) 535, 542. To same effect: *McKnight v. Walsh*, 23 N. J. Eq. 136, 146; *Rowan v. Kirkpatrick*, 14 Ill. 1, 11.

³ *Clay v. Clay*, 3 Metc. (Ky.) 548; *Greening v. Fox*, 12 B. Mon. 187, 188.

⁴ *Williams v. Petticrew*, 62 Mo. 460, 472; *Schieffelin v. Stewart*, 1 Johns. Ch. 620, 627; *Swindall v. Swindall*, 8 Ired. Eq. 285; *Farwell v. Steen*, 46 Vt. 678; *Berwick v. Halsey*, 4 Redf. 18; *Camp v. Camp*, 74 Mo. 192.

⁵ Only where the amounts were large

and easily invested: *Barney v. Saunders*, 16 How. (U. S.) 535, 542. See *Raphael v. Boehm*, 11 Ves. 92, in which case the Lord Chancellor argues the subject thoroughly, and reluctantly allows semi-annual rests, under the peculiar facts of the case.

⁶ 81 Mo. 676, 683, citing authorities. See also *Foltz' Appeal*, 55 Pa. St. 428.

⁷ A distinction is drawn in this case between the liability of an executor and that of a guardian for the use of trust funds, but only to the extent of the difference in the statutory provisions touching the duties of these officers. What is said of executors has full application to guardians unless the statute provide differently.

⁸ In *Hollister v. Barkley*, 11 N. H. 501, 511.

⁹ *Armstrong v. Campbell*, 3 Yerg. 201,

¹⁰ *Reed v. Timmins*, 52 Tex. 84, 89; *Turney v. Williams*, 7 Yerg. 172, 214; *Tyler, in re*, 40 Mo. App. 378, 388.

The law, as deduced from the later decisions and text-books of modern authors, on this subject, is comprehensively and lucidly stated by Judge Martin, in the case of *Cruce v. Cruce* above cited. He mentions as "underlying principles" the accountability of trustees for all interest actually received, whether from the use of the trust fund by himself or otherwise, so as to prevent any advantage to the trustee save his statutory compensation; and also accountability for such interest or profit as he might have obtained by the exercise of reasonable skill and exertion in the management of the fund; and then adds, by way of corollary to these propositions: —

Rule stated in
Cruce v. Cruce.

"All orders for periodical rests and for compounding interest should be adapted, not for punishing the delinquent trustee, but for the purpose of attaining the actual or presumed gains, and to make certain that nothing of profit or advantage remains to the trustee, except, perhaps, his commissions or compensation."¹

The compounding of interest, on any theory, should cease when the relation of guardian and ward ceases, from which time on only current interest is to be computed upon the amount then due until it is paid.² Nor should a guardian be charged with interest on the balance of his account held ready for distribution, pending the decision of the court on exceptions, unless he has made use of the money; and inquiry whether he have used it may be made in the appellate court.³ But tender to the county judge of a sum less than that subsequently adjudged to be due the ward, does not relieve the guardian from liability for interest, because the judge was not authorized to receive it. The tender should be to the guardian's successor, and of the whole amount due.⁴

Compounding
ceases when
guardianship
ceases.

No interest
where guar-
dian holds
money ready
to turn over.

239; *Clarkson v. De Peyster*, 1 Hopk. Ch. 424, 427; *Hook v. Payne*, 14 Wall. 252, 257; *Ackermann v. Emott*, 4 Barb. 626, 649; *Vance v. Vance*, 32 La. An. 186, 190; *Matter of Hollingsworth*, 45 La. An. 134, 144; *Cousin's Estate*, 44 Pac. (Cal.) 182.

¹ *Cruce v. Cruce*, 81 Mo. 676, 684. In support of this view he cites, besides some of the cases, *supra*, *Voorhees v. Stoothoff*, 11 N. J. L. 145, 148; *Jones v. Foxall*, 15 Beavan, 388, 395; *Ringgold v. Ringgold*, 1 Har. & G. 11, 65, 80; *Utica Ins. Co. v. Lynch*, 11 Paige, 520, 523; *Kyle v. Barnett*, 17 Ala. 306, 311; *Johnson v. Miller*,

33 Miss. 553, 558; *Hough v. Harvey*, 71 Ill. 72, 77.

² *Clay v. Clay*, 3 Metc. (Ky.) 548, 555; *Tanner v. Skinner*, 11 Bush, 120, 130; *Finnell v. O'Neal*, 13 Bush, 176; *State v. Gilmore*, 50 Mo. App. 353, 356; *McKay v. McKay*, 33 W. Va. 724; *Rowan v. Kirkpatrick*, 14 Ill. 1, 11; *Armstrong v. Walkup*, 12 Gratt. 608, 612.

³ *Mott's Appeal*, 26 N. J. Eq. 509, 513; *Thompson v. Thompson*, 92 Ala. 545, 550; *Cheney v. Roodhouse*, 32 Ill. App. 49, 52 (reversed on the facts in s. c. 135 Ill. 257.) *Dietterich v. Heft*, 5 Pa. St. 87.

⁴ *Cheney v. Roodhouse*, 135 Ill. 257, 268.

It is also to be remembered, that for interest-bearing securities coming into the hands of the guardian, he is liable for such interest during the time they remain unpaid, including any obligations of his own; and that the burden of proof rests upon him to show when such interest ceased to be paid.¹

Liable for interest on interest-bearing securities.

¹ Williams v. Pettericrew, 62 Mo. 460.

TITLE THIRD.

OF THE CONVERSION OF REAL ESTATE OF MINORS.

CHAPTER IX.

OF OBTAINING LICENSE OR ORDER FOR THE SALE OF REAL ESTATE OF MINORS.

§ 68. **Inherent Chancery Power to order the Sale of Minors' Real Estate.**—It is a well-known general rule of the common law that the nature of an infant's property must not be changed, either by a guardian or trustee out of court, or by the court itself, so as to convert personal property into real, or real property into personal.¹ The reason given is the unwillingness of courts to deprive infants of the powers vested in them previous to the Wills Act,² enabling males of the age of fourteen and females of the age of twelve years to bequeath personal property, while no one could devise real estate before the age of twenty-one years.³ From this rule of the common law, forbidding the conversion of a minor's property for any purpose (save that of paying debts, or supporting and educating the minor),⁴ the English doctrine originated that the property of

Minors' lands
not convertible
at common
law,

¹ Macpherson on Inf. 278; Phillips, *ex parte*, 19 Ves. 118, p. 122 *et seq.*

² 1 Vict. ch. 26.

³ "I have uniformly made it a rule," says Lord Chancellor Eldon, "when property of one nature has been applied for the benefit of an infant to property of another nature, to have an express provision, that if he shall not attain the age at which he shall have a disposable power, the representative shall not be prejudiced in any degree by the act done by the court in contemplation of the

infant's benefit:" Ware v. Polhill, 11 Ves. 257, 278. See, also, Williams' Case, 3 Bland Ch. 186, 190, with numerous citations; Taylor v. Philips, 2 Ves. Sen. 23.

⁴ "I confess I have not been able to find a case in any of the English books, where a sale of real estate of an infant has been ordered on the ground alone that it would be for the interest of the infant, unless connected with the further reason of paying debts, or providing a maintenance for the infant:" Dargan, J., in Jewett, *ex parte*, 16 Ala. 409, 410.

except by act
of Parliament,

an infant could be converted only by act of Parliament, no matter how desirable or beneficial it might be in the infant's interest,¹ unless the court obtained jurisdiction

unless it be to
pay a debt, or
for the support
of the minor.

by the application of some person for an order to sell the estate for the satisfaction of a claim,² or for the maintenance of the infant.³

The reason mentioned (as to the difference in the power of an infant over real and over personal property) has ceased to exist in England, since by the Wills Act⁴ neither personal nor real estate can be disposed of by persons under twenty-one years of

Reason of the
rule only slight
in America.

age, and never existed in the United States, except to a very slight extent.⁵ And so, too, the equitable rule, according to which the proceeds of converted prop-

erty are treated throughout as impressed with the same character it possessed before conversion,⁶ has obviated any objection to conversion on the score of any difference in the descent of real and of personal property, in America as well as in England. But the rule itself, denying to courts and guardians, without statutory

But the rule
survives to
great extent.

authorization, the right to convert the estate of infants, survives in England, and has taken deep root in America. Tucker, J., in a *dictum* in which he reviews the English and American authorities on this subject, expresses a decided opinion denying the jurisdiction,⁷ and his opinion was, as stated by Judge Moncure in a later case,⁸ generally regarded and acted upon as a sound exposition of the law. It has been so decided in many cases.⁹ But, on the other hand, it is said,

¹ Russell v. Russell, 1 Malloy, 525; Taylor v. Philips, 2 Ves. Sen. 23; Rogers v. Dill, 6 Hill (N.Y.), 415, 417; Faulkner v. Davis, 18 Gratt. 651, 664; Stansbury v. Inglehart, 20 D. C. 134, 152, 154.

² Calvert v. Godfrey, 6 Beav. 97, 107; Garmstone v. Gaunt, 1 Coll. 577, 582.

³ Howarth, *in re*, L. R. 8 Ch. App. 415, 418; in such case the court may change even reversionary property: De Witte v. Palin, L. R. 14 Eq. 251.

⁴ 1 Vict. ch. 26.

⁵ In some of the States a distinction still exists as to the testamentary capacity for willing real and personal estate; see Woerner on Administration, § 20, p. 24.

⁶ The rule of equitable conversion (according to which the surplus remaining after the accomplishment of the object

for which real estate has been converted into money, either by the owner, or by the operation of law, is regarded in equity, between the heir and the personal representative of the owner, as land) is applicable in cases of sale of real estate to pay debts: Fidler v. Higgins, 21 N. J. Eq. 138, 145, citing as authority Lerch v. Oberly, 18 N. J. Eq. 575. See *post*, § 91, on the disposition of Proceeds of Sale.

⁷ In Pierce v. Trigg, 10 Leigh, 406, 419.

⁸ Faulkner v. Davis, 18 Gratt. 651, 663.

⁹ So, besides the American cases *supra*, in Baker v. Lorillard, 4 N. Y. 257, 266; O'Reilly v. King, 2 Robert. 587, 593; Forman v. Marsh, 11 N. Y. 544, 551; Onderdonk v. Mott, 34 Barb. 106, 113; Thurston v. Thurston, 6 R. L. 296, 301; Rogers v.

that if it be for the manifest benefit of the infant, the court may authorize his personal property to be changed into real, and his real property into personal.¹

But there are many authorities to the contrary.

And according to Story, "Guardians may, under particular circumstances, where it is manifestly for the benefit of the infant, change the nature of the estate; and the court will support their conduct if the act be such as the court itself would have done under the like circumstances by its own order."² Chancery courts have, accordingly, in the absence of statutory regulation on the subject, claimed power to authorize the conversion of minors' real estate in many cases.³ It is of little practical importance, however, whether such power is inherent in chancery courts, because the subject of the sale of real estate of minors is now regulated by statute in the several States.

Subject now regulated by statute.

The power to order the sale of real estate of a decedent, if his personal estate is insufficient, is inherent in chancery courts, and is exercised by them in all such States as have not lodged this power elsewhere, to the exclusion of chancery courts;⁴ and it is no defence that the heirs are infants.⁵ In Missouri, where the statute, before the passage of an act authorizing the Circuit Court to order the sale of the real estate of minors, had vested such power in probate courts, it was held that the proceedings of a court of equity to sell such estate are not absolutely void, even if the court exceeds

Power to order sale of real estate of minors inherent in chancery.

Clark, 5 Sneed, 665, 668; Dodge v. Cole, 97 Ill. 338, 355.

¹ Per Chancellor Kent, in the Matter of Salisbury, 3 Johns. Ch. 347, 348, citing as authority notes to the Earl of Winchester v. Norcliff, 1 Vern. 435; and Lord Hardwicke in Amb. 419.

² 2 Story Eq. Juris. § 1357.

³ *Ex parte Jewett*, 16 Ala. 409. (So announced by the court, but the application was refused on the ground that it was not shown to be beneficial to the ward); *Snowhill v. Snowhill*, 3 N. J. Eq. 20 (holding that courts of equity may, and frequently do, change the character of property, when manifestly for the interest of the infant); *Dorsey v. Gilbert*, 11 Gill & J. 87, 90; *Smith v. Sackett*, 10 Ill. 534, 545, affirmed in *Allman v. Taylor*, 101 Ill.

185, 191; *Martin v. Keeton*, 10 Humph. 536; *Huger v. Huger*, 3 Desaus. 18, 21; *Stapleton v. Vanderhorst*, 3 Desaus. 22; *Rivers v. Durr*, 46 Ala. 418, 422; *Goodman v. Winter*, 64 Ala. 410, 434; *Kearney v. Vaughan*, 50 Mo. 284, 288; *Wood v. Mather*, 38 Barb. 473, 482; *Anderson v. Mather*, 44 N. Y. 249, 259; *Thompson v. Mebane*, 4 Heisk. 370, 376; *Hurt v. Long*, 6 Pickle, 445, 460. See an elaborate review of the authorities by Bailey, Chief Justice of the Supreme Court of Illinois, pronouncing the judgment of the court in *Hale v. Hale*, 146 Ill. 227, 249.

⁴ Woerner on Adm. § 463, and authorities cited; *Ruffin, C. J.*, in *Williams v. Harrington*, 11 Ired. 616, 620.

⁵ *Thompson v. Brown*, 4 Johns. Ch. 619, 645.

its powers, but only relatively void, so that only the heirs themselves, but not strangers, can disregard or avoid it.¹ If the heirs or devisees of the decedent are minors, it is provided, in many States, that a guardian *ad litem* is to be appointed by the court ordering the sale, whose duty it is to make such defence in protection of the ward's interest as he may be able to make;² if there be no such statutory requirement, the sale is held good without such appointment, in direct as well as in collateral proceedings.³

It has been held that the land of an infant may be sold on execution, and that it is not necessary that the guardian should first convert it into money to pay the judgment.⁴

A bill for the sale of lands of persons under disability must be filed either in the county where the land lies, or where the person under disability resides; no other court has jurisdiction.⁵ Irregularities in the proceedings, if not such as to deprive the court of jurisdiction, will not be permitted to stand in the way of a confirmation of the sale, if the confirmation is promotive of the interests of minor parties, but the purchaser will be compelled to comply with the terms of sale, and his title perfected, if necessary, by divestiture.⁶

§ 69. **Sale of Minors' Real Estate under Special Statutes.** — The constitutionality of private or special acts, vesting authority in some individual named or pointed out to do what other individuals under like circumstances have not the power to do, has been doubted, and in many cases denied. The objection most generally urged against such acts is, that they constitute an usurpation by the legislative branch of the government of powers or functions vested by the Constitution in another branch. In answering this objection, Judge Story reasoned, and the court held, in an early case coming before the

¹ Kearney v. Vaughan, 50 Mo 284, 287.

² Woerner on Adm. § 467, p. 1034, naming as such States Alabama, Illinois, Indiana, Iowa, New York, North Carolina, Ohio, Tennessee, and Virginia.

³ *Ib.*, instancing, as States in which it is so held, Kansas, Massachusetts, Mis-

souri, Nebraska, New Hampshire, and Wisconsin.

⁴ Shaffner v. Briggs, 36 Ind. 55, 59.

⁵ Williams v. Williams, 10 Heisk. 566, 570.

⁶ Swan v. Newman, 3 Head, 88; to similar effect: Kirkman, *ex parte*, 3 Head, 517.

Supreme Court of the United States from Rhode Island,¹ that where an executrix under a will proved in New Hampshire sold land in Rhode Island for the payment of debts, the legislature of the latter State might, by a resolve, confirm and validate such sale, on the ground, that such act was not judicial, but legislative.² So it was held in Pennsylvania, that an act authorizing the sale of land, willed in trust for several beneficiaries, on ground-rents, redeemable or irredeemable, was constitutional, as standing on the notions of parliamentary power derived from England, because "the Constitution allows to the legislature every power which it does not positively prohibit."³ But private acts directing the sale of real estate of persons *sui juris*, without their consent, are held unconstitutional in that State, as being violative of the provision of the United States Constitution ordaining "that no person shall be deprived of life, liberty, or property, without due process of law," and of the equivalent provision in the Pennsylvania Constitution.⁴ And the possession of judicial power by the legislature was emphatically denied, and any attempt to exercise such held unconstitutional and void.⁵

Sales of real estate belonging to minor or adult heirs of decedents, by authority of special or private acts of the legislature, have been sanctioned under the Constitution of the United States, and in the United States Supreme Court,⁶ and in Alabama,⁷ California,⁸ Connecticut,⁹ Illinois,¹⁰

Held valid.

¹ *Wilkinson v. Leland*, 2 Pet. 627, 660.

² " . . . The laws of Rhode Island, in all cases, make the real estate of persons deceased chargeable with their debts. . . . If the authority to enforce such a charge by a sale be not confided to any subordinate court, it must, if at all, be exercised by the legislature itself:" *Ib.*, p. 660.

³ *Norris v. Clymer*, 2 Pa. St. 277, 284.

⁴ *Ervine's Appeal*, 16 Pa. St. 256, 263; *Hegarty's Appeal*, 75 Pa. St. 503, 517; *Kneass' Appeal*, 31 Pa. St. 87.

⁵ *De Chastellux v. Fairchild*, 15 Pa. St. 18, overruling *Braddee v. Brownfield*, 2 Watts & S. 271, holding that judicial powers may sometimes be exercised by the legislature.

⁶ *Florentine v. Barton*, 2 Wall. 210, 217; *Hoyt v. Sprague*, 103 U. S. 613, 633; *Watkins v. Holman*, 16 Pet. 25, 59.

⁷ *Holman v. Bank of Norfolk*, 12 Ala. 369, 414 *et seq.*

⁸ *Brenham v. Davidson*, 51 Cal. 352, 357, holding that the authorizing of a guardian to sell his ward's land, subject to the approval of the Probate Court, is not an assumption of judicial power by the legislature; the general law failing to provide for the contingency. But see *infra*, showing that such acts are void if for any but a remedial purpose.

⁹ *De Mill v. Lockwood*, 3 Blatchf. 56.

¹⁰ *Mason v. Wait*, 5 Ill. 127, 134. "These State governments . . . can do any legislative act not prohibited by the constitutions; and without and beyond these limitations and restrictions, they are as absolute, omnipotent, and uncontrollable as parliament." But see, to the contrary, *infra*.

Indiana,¹ Kentucky,² Maryland,³ Massachusetts,⁴ Mississippi,⁵ Missouri,⁶ New Jersey,⁷ New York,⁸ Pennsylvania,⁹ Rhode Island,¹⁰ Vermont,¹¹ and Virginia.¹²

The validity of such acts has been denied, and the sales under them held void, in California,¹³ Illinois,¹⁴ New Hampshire,¹⁵ New York,¹⁶

¹ Doe v. Douglass, 8 Blackf. 10.

² Kibby v. Chetwood, 4 T. B. Mon. 91, 95.

³ Dorsey v. Gilbert, 11 Gill & J. 87.

⁴ "Notwithstanding they have delegated the same power to the judicial courts:" Rice v. Parkman, 16 Mass. 326; Davison v. Johonnot, 7 Metc. (Mass.) 388 (case of a *non compos*).

⁵ McComb v. Gilkey, 29 Miss. 146, 186; Williamson v. Williamson, 3 Sm. & M. 715, 744 (Judge Clayton says, in this case, that the Chancery Court may by its decree annul an act of the legislature obtained by fraud, p. 746).

⁶ Thomas v. Pullis, 56 Mo. 211, 216. Judge Napton, calling attention to the circumstance, that in the case of Gannett v. Leonard, 47 Mo. 205, the sale under such an act was held good, although the property of the infant was wholly lost, to the amount of \$60,000, because the legislature had required no bonds of the person authorized to convey the title; and in the case referred to (Gannett v. Leonard), Judge Bliss remarked (p. 208): "It certainly was improvident legislation, and shows very bad guardianship on the part of the State. . . . It is because of the sacrifice of the interests of persons under disability that has sometimes followed such legislation, that it is totally prohibited by the present constitution."

⁷ Snowhill v. Snowhill, 2 N. J. Eq. 30 (the authority not being questioned).

⁸ Breevort v. Grace, 53 N. Y. 245, 251; Cochran v. Van Surly, 20 Wend. 365; Clark v. Van Surly, 15 Wend. 436, 439; but see Breevort v. Grace, *supra*, and cases *infra*, limiting the power of the legislature to cases where the owners are under disability.

⁹ See Pennsylvania cases, *supra*; Estep v. Hutchins, 14 Serg. & R. 435.

¹⁰ Thurston v. Thurston, 6 R. I. 296, 302; Ward v. New England Screw Co., 7 Cliff. 565, 573.

¹¹ Langdon v. Strong, 2 Vt. 234, 256.

¹² Spotswood v. Pendleton, 4 Call, 514, 520, holding that, if obtained by fraud, the act would be void; and that in the absence of proof of fraud, no averments can be made against the facts stated therein.

¹³ Distinguishing between acts directing the sale of real estate for the payment of debts, or acts entirely remedial for the satisfaction of liens existing against the property, which are held to be within the scope of legislative power, and directions to sell for any other purpose, which are held unconstitutional: Brenham v. Story, 39 Cal. 179, 185 *et seq.*; Pryor v. Downey, 50 Cal. 388, 401 *et seq.* And see Paty v. Smith, 50 Cal. 153, 158, doubting the power; and also Brenham v. Davidson, 51 Cal. 352, for the converse of this proposition.

¹⁴ Dubois v. McLean, 4 McLean, 486, 488; Lane v. Dorman, 4 Ill. 238; Rozier v. Fagan, 46 Ill. 404, distinguishing between acts in which the legislature assume or determine the existence of debts, which is a judicial function, and therefore an unconstitutional usurpation of power by the legislature, and such acts as require the proceeding to take place, under the control and direction of a court. See Mason v. Wait, 5 Ill. 127.

¹⁵ In answer to the inquiry by the House of Representatives of June 25th, 1827, — "Can the legislature authorize a guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his wards?" — the justices of the Supreme Court of Judicature of that State announce, after a lucid statement of their reasons, that it cannot: 4 N. H. 565, 572 *et seq.*

¹⁶ Powers v. Bergen, 6 N. Y. 358, holding that the legislature has not the power to authorize the sale of private property without the owner's consent, except in cases of necessity arising from the infancy or other disability of those in whose behalf it acts. Adopting the reasoning of

Tennessee,¹ and Wisconsin.² It is held in Michigan, Held invalid. that a purchaser at a judicial sale has a right to presume that it is conducted under the provisions of the public law; and if good according to that law, he will be protected notwithstanding the existence of a private statute authorizing the sale, of which he had no knowledge, and the provisions of which were ignored.³ In several of the States fine distinctions have been drawn, — for instance, holding special acts valid where no general law existed to accomplish the purpose of the special act, and unconstitutional otherwise; holding acts remedial in their nature to be the exercise of legislative power, and therefore valid, while any exercise of judicial power is held unconstitutional; and holding acts valid in cases of infants, that would be invalid in the cases of adult owners. On principle, it would seem that any statute authorizing a guardian, trustee, or other person to do what under the general law, or without the special law, they could not do, is thoroughly repugnant to the American theory of government. Equality is the foundation of justice: that the community at large should be bound by one law, and John Doe by another; or that Richard Roe should have the benefit of a law which is denied to all others, is not justice, because it is not equality. The interests of infants, particularly, is jeopardized when their property interests are dealt with in the absence of the safeguards which the constitution throws around the “life, liberty, and property” of all persons, of which they cannot be deprived “without due process of law,” — obviously contemplating “the law of the land,” not a special judgment, decree, or order of a body having no power to render a decree, judgment, or order. The lobby of a legislative body is not a safe place to determine, *ex parte*, the rights of minors or persons under disability, at the solicitation of parties who prefer the legislature to a court of justice to accomplish their ends; in the language of Judge Bliss,⁴ this is “improvident legislation, and shows very bad guardianship on the part of the State.”

Distinctions between valid and invalid sales under special statutes.

Judge Bronson in *Taylor v. Porter*, 4 Hill (N. Y.), 140, discussing the powers of the legislature in dealing with private property.

¹ *Jones v. Perry*, 10 Yerg. 59, 69, on the ground that the term, “the law of the land” in the constitution means a general

and public law, operating equally upon every member of the community.

² *Culbertson v. Coleman*, 47 Wis. 193.

³ *Browning v. Howard*, 19 Mich. 323.

⁴ *Gannett v. Leonard*, 47 Mo. 205.

Hence, as suggested by the same judge, it is, that the people, in reforming their constitutions, have in many States deprived the legislatures of all power in this direction. In this inhibition is included, in most instances, all power to pass special laws of any kind; for which reason the question as to the validity of sales of real estate of minors under special legislative acts is diminishing in practical importance.

A statute authorizing guardians of infants to convey their wards' land to railroads, if it is necessary for the purposes of the road, and requiring the examination and approval of the probate judge to such conveyance before the same shall become valid, is held constitutional in California.¹

§ 70. **Courts controlling Sales of Infants' Real Estate under General Statutes.** — The conversion of real property owned by infants into personalty, and to mortgage their real estate, is now regulated by general statutes in probably all of the States. Jurisdiction to

Courts having power to order sale of real estate of minors. this end is vested, in some of them, in the ordinary courts of chancery jurisdiction, that is to say, in chancery courts as such; for instance, in Connecticut,² Kentucky,³ Maryland,⁴ Mississippi,⁵ Tennessee,⁶ Virginia,⁷ and probably West Virginia;⁸ or in courts of plenary jurisdiction having power for this purpose, as in Colorado,⁹ Delaware,¹⁰ Iowa,¹¹ Nebraska,¹² North Carolina;¹³ or in probate courts, or courts possessing probate jurisdiction, as in most of them. Some of the States, also, give concurrent, or divided, jurisdiction, in this respect, to probate and other courts.¹⁴

¹ *Hodgdon v. South. P. R. R. Co.*, 75 Cal. 642, 649.

² Gen. St. 1887, § 808.

³ Gen. St. 1894, § 2030; *Tyler v. Tyler*, 19 S. W. (Ky.) 666.

⁴ Code, 1888, Art. 16, § 48.

⁵ Ann. Code, 1892, § 2205.

⁶ Or in County Court: Code, 1884, § 3388. It is held that in this State "the County Court has never at any time been authorized to sell an infant's land because for his interest, or in order to support him, or to prevent a multiplicity of suits:" *Trousdale v. Maxwell*, 6 Lea, 161, 163.

⁷ Code, 1887, § 2616, 2617.

⁸ Code, 1891, ch. 83.

⁹ District Court: *Mills' Ann. St.* 1891, § 2083.

¹⁰ Orphans' Court: Rev. Code, 1874, p. 580, § 22.

¹¹ Circuit Court: Ann. Code, 1888, § 2257.

¹² District Court: Comp. St. 1891, ch. 23, § 42.

¹³ Superior Court: Code, 1883, § 1602.

¹⁴ For instance, in Maine: Rev. St. 1883, ch. 71, § 3; *Nowell v. Nowell*, 8 Me. 220, 222. Connecticut: Gen. St. 1888, §§ 463, 808. In Arkansas it is held that the statute conferring upon probate courts jurisdiction to order the sale of a ward's lands for purposes of investment, did not deprive the court of equity of its jurisdiction to order the sale of an infant's land for his maintenance: *Shumard v. Phillips*, 53 Ark. 37, 43. In the District

These courts, whether equity, law, or probate courts, whenever they act in a proceeding to sell or mortgage the real estate of infants, exercise a statutory power, and must conform strictly to the statutory requirements. "It is elementary," says Chief Justice Ruger of the Court of Appeals of New York, in reversing the judgment of the Supreme Court in a chancery case,¹ "that statutory provisions in derogation of the common law, by which the title of one is to be divested, and transferred to another, must be strictly pursued, and every requisite thereof having the semblance of benefit to its owner must be complied with in order to divest his title."² The power to sell the inheritance of infant heirs is purely statutory.³ Hence, a probate court has no power to confer authority on a guardian to sell his ward's real estate, if the statute does not confer such power,⁴ at least not without application on behalf of the infant.⁵ The power of courts of equity to relieve against the defective execution of a power created by an individual, for the purpose of carrying out the intention of the creator of the power, and of the agent who imperfectly executed it, does not enable these courts to remedy a defective execution of a power created by law, for they cannot dispense with the regulations prescribed by the statute.⁶ It follows, that sales of realty belonging to minors, without strict compliance with the law of the land, are nullities, in no wise affecting the title of the minors.⁷

Must conform strictly to statutory requirements.

Chancery has no power to remedy defective execution of a power created by law.

It is held that the claimant of title under such a sale must establish, by affirmative evidence, that every requirement of the statute necessary to confer jurisdiction upon the court to order a sale of the infant's property has been complied with. Its jurisdiction is made

Purchaser must affirmatively show regularity of the proceeding to sell.

of Columbia, the Orphans' Court, with the approval of the Circuit Court of the United States of the District of Columbia, sitting in chancery, has power to order the sale of real estate of infant wards for their maintenance and education: *Thaw v. Ritchie*, 136 U. S. 519, 540.

¹ *Ellwood v. Northrup*, 106 N. Y. 172, 185.

² Citing *Atkins v. Kinnan*, 20 Wend. 241, turning upon the validity of an executor's sale under order of the surrogate, p. 245; *Battell v. Torrey*, 65 N. Y. 294, 296; *Stilwell v. Swarthout*, 81 N. Y.

109, 113; *Matter of Valentine*, 72 N. Y. 184, 187. To same effect: *Barrett v. Churchill*, 18 B. Mon. 387, 390; *Strouse v. Drennan*, 41 Mo. 289, 290.

³ *Filmore v. Reithman*, 6 Col. 120, 130, opinion by Elbert, Ch. J.

⁴ *Summers v. Howard*, 33 Ark. 490, 494; and see, to similar effect: *Foresman v. Haag*, 36 Oh. St. 102, 104; *Perin v. Megibben*, 53 Fed. 86, 96.

⁵ *Strong v. Lord*, 107 Ill. 25, 32.

⁶ *Young v. Dowling*, 15 Ill. 481, 483.

⁷ *Wells v. Chaffin*, 60 Ga. 677; *Strouse v. Drennan*, 41 Mo. 289, 294.

conditional, and the circumstances upon which it depends must be made to appear by proof.¹ Where the record shows that the petition was an application to sell, and not to mortgage,

the order to mortgage is without jurisdiction and void.² So the sale by one not shown by the record to have been appointed guardian is not valid.³

Where the statute authorized a sale of the minor's real estate for his "proper education" according to his means,⁴ a sale ordered by the court for the minor's support was held unauthorized, and not to confer any title upon the purchaser;⁵ and when the statute requires a report to the court at the next term after the sale, the approval of a sale reported at the same term when made was held beyond the jurisdiction of the court, and that no title passed thereby.⁶ But this rule was held not applicable in a sale by order of the Circuit Court, because the latter was a court of general jurisdiction whose judgment can, while that of a probate court cannot, be reviewed by a writ of error;⁷ and the theory on which the above Missouri cases were decided, in so far as it denied to the judgments of probate courts the same validity and collateral unimpeachability as is accorded to judgments of other courts, was wholly repudiated in the case of *Johnson v. Beazley*,⁸ and thereafter the approval during the same term was held to render the sale voidable, but not void.⁹ Where the statute authorized the guardian, having notice of a debt of his ward, to apply to the court "for an order to sell so much of the real estate of such ward as may be sufficient to discharge such debt or demand," and that the order of the court shall "particularly specify what property may be sold," it was held that an order "to sell as much of the lands . . . as will satisfy the debts" is unauthorized and void, and the sale made by the guardian in pursuance thereof confers no title on the purchaser, because "the court, instead of exercising its own discretion, . . . has undertaken to delegate this discretion on the guardian;"¹⁰ and so a sale is void if it does not

¹ *Ellwood v. Northrup*, *supra*.

² *McMannis v. Rice*, 48 Iowa, 361, 363.

³ *Higginbotham v. Thomas*, 9 Kans. 328, 334.

⁴ Rev. St. Mo. 1845, ch. 73, § 22.

⁵ *Beal v. Harmon*, 38 Mo. 435, 438; *Blackburn v. Bolan*, 88 Mo. 80.

⁶ *Strouse v. Drennan*, 41 Mo. 289, 302;

Mitchell v. Bliss, 47 Mo. 353; *State v. Towl*, 48 Mo. 148.

⁷ *Castleman v. Relfe*, 50 Mo. 583, 588; *Bobb v. Barnum*, 59 Mo. 394, 398; *State v. Towl*, *supra*.

⁸ 65 Mo. 250.

⁹ *Murray v. Purdy*, 66 Mo. 606; *Henry v. McKerlie*, 78 Mo. 416, 429.

¹⁰ *Leary v. Fletcher*, 1 Ired. L. 259, 261,

appear that the court ascertained the fact that a debt was due from the estate of the ward, or if the petition fail to allege that the debt was created by the ancestor.¹ Sale of an infant's real estate by one who was not legally appointed guardian, no notice having been given to "all persons interested," as required by statute, is void,² nor is it validated by a statute confirming sales made by order of probate courts where there have been "defects of form, or omissions, or errors."³ So a sale may be avoided collaterally where the decree upon which it is based fails to show upon its face that the court had jurisdiction to make it.⁴

The application for an order of sale by a guardian is usually made to the court under whose order he received his appointment. But when the court to which application must be made for an order of sale is pointed out by statute, no other court possesses jurisdiction, and the sale is void when made under the order of such other court.⁵

Sale must be ordered by a court having jurisdiction.

In the absence of contravening statutory provision, it is the court having jurisdiction of the guardianship that has also jurisdiction to order the sale of land of the wards for their support and maintenance, no matter where the land may be in the estate.⁶

§ 71. Grounds on which the Order to sell may be granted. — Although the statutes in a number of States authorize the sale of infants' real estate, for the payment of debts, on the application of guardians, it is more usually the executor or administrator of the ward's ancestor or other relative, through whom he derives title by devise or descent, that is called on to satisfy creditors. For under English and American statutes the real estate of a deceased owner passes to heirs and devisees subject to a power in executors and administrators to defeat their title by a sale for the payment of debts incurred by the intestate or testator.⁷ Where the statute authorizes the court to order the guardian to sell his ward's real estate for the payment of his debts, and makes the proceeds assets in the guardian's hands, the court

Sale to pay debts usually made by executor or administrator;

but if debts of ward exist, may be made by guardian on proper order.

affirmed in *Ducket v. Skinner*, 11 Ired. L. 431; *Spruill v. Davenport*, 3 Jones L. 42, 44.

¹ *Coffield v. McLean*, 4 Jones L. 15.

² *Seaverns v. Gerke*, 3 Saw. 353, 367, relying on *Galpin v. Page*, 18 Wall. 350, 364, and *Frederick v. Pacquette*, 19 Wis. 541.

³ *Seaverns v. Gerke*, *supra*.

⁴ *Starkey v. Hammer*, 1 Bax. 438.

⁵ *Spellman v. Dowse*, 79 Ill. 66; *Foresman v. Haag*, 36 Oh. St. 102.

⁶ *Matthews v. Matthews*, 16 S. (Ala.), 91, overruling *Turnipseed v. Fitzpatrick*, 75 Ala. 297, 301.

⁷ See, on this subject, *Woerner on Administration*, §§ 337 *et seq.*, 463 *et seq.*

must, before making such an order, ascertain the existence of such debts,¹ and the guardian must apply the proceeds of the sale to the payment of the debts according to the same priority as would govern an executor or administrator in applying personal assets to such payment;² so that where a judgment was obtained against an infant heir by *sci. fa.*, with a stay of execution for one year, during which time another creditor commenced suit and obtained judgment against the heir on a bond of the ancestor, and issued a *fi. fa.* before the expiration of the stay, the purchaser under it had a better title than one under a *fi. fa.* afterwards issued on the first judgment.³ The purpose for which

Purpose of sale
should be
stated in
petition.

the sale is asked should be stated in the petition presented to the court, — whether for the payment of debts or otherwise, so that the proceedings may be governed by the respective statutory provisions; and it is held that the omission to state the ground of the application is fatal to the validity of the sale, at least in a direct proceeding.⁴ So it is provided in Maine that where the sale is asked for the payment of debts, the order will be refused if any one will give bond for the payment of all the debts alleged;⁵ and where the application is to the Supreme Court, it must be accompanied by a certificate from the Probate Court, showing the value of the real estate, and whether in its opinion the sale of all or of a part only is necessary.⁶

The most usual ground on which authority for sale of infants' real estate is solicited, is the necessity to raise funds for the education and maintenance of minors, on account of the insufficiency of the personal property or income from the real estate of the ward. Power is given to order the sale of their real estate for this purpose in perhaps all of the States, coupled, mostly, with the phrase "as much thereof as may be necessary," either as an alternative, or as a restriction. In Missouri, where the statute authorized probate courts to "order the proper education of minors, according to their means," and if

Sale for support and education of ward.

¹ Leary v. Fletcher, 1 Ired. L. 259; Duckett v. Skinner, 11 Ired. L. 431; Pendleton v. Trueblood, 3 Jones L. 96, 97; Spruill v. Davenport, 3 Jones L. 42.

² Marchant v. Sanderlin, 3 Ired. L. 501.

³ Ricks v. Blount, 4 Dev. 128, 131.

⁴ Ryder v. Flanders, 30 Mich. 336, 341. *et seq.* But not collaterally: Weems v. Masterson, 80 Tex. 45. See as to collateral attacks *post*, § 87.

⁵ Rev. St. Maine, 1883, ch. 71, § 7.

⁶ *Ib.* § 9.

the personal estate were insufficient or not applicable to that object, to order the lease or sale of real estate, it was held that an order to sell "for support and maintenance" was void, and a sale under it conveyed no title.¹

In most States it is now provided by statute, that the sale of an infant's real estate may also be ordered in cases where it is not needed for the payment of debts, or for the education or maintenance of the infant, but where the sale would be for the benefit of a ward, by investing the proceeds in interest-bearing bonds, notes, and bills of exchange, mortgage security, or other security in the name of the ward,² or, as is provided in some States, for the discharge of a lien or debt charged on the land, or when the real estate is subject to waste, or dilapidation,³ or in anticipation of accruing expenses,⁴ or if for any reason it be deemed to be for the ward's interest,⁵ or even for investment in other real estate.⁶ Under a statute authorizing the sale of an infant's real estate "whenever . . . a better investment of the value thereof can be made," a petition setting forth that it would be for the interest of a ward to convey certain of his real estate in part payment of the conveyance to him of a piece of land was held sufficient to support an order of the court to make the exchange.⁷ But in Texas, whose statutes do not in terms authorize an order for the sale by a guardian of land owned jointly by the ward and another (although such power is given in cases of administration of the estates of deceased persons), it is held that a sale under an order for the purpose of partition is void, though subsequently approved with a recital that the sale was made for the purpose of paying debts.⁸ In Maryland, on the other hand, where the statute authorizes the Chancery Court to direct the sale of infants' lands if satisfied that it is for

Sales for
reinvestment
of proceeds,

or other
purposes.

¹ *Beal v. Harmon*, 38 Mo. 435, 438; *Strouse v. Drennan*, 41 Mo. 289, 291.

² As is the case in Arkansas, Missouri, and numerous other States.

³ For instance, in Indiana: Rev. St. 1888, § 2528; Ohio: Rev. St. 1890, § 6280; Tennessee: Code, 1884, § 3388; Washington: Hill's St. & C. 1891, § 1144; Wyoming: Rev. St. 1887, § 2259.

⁴ As in Maine: Rev. St. 1883, ch. 71, § 1.

⁵ As in Delaware: Rev. Code, 1874; Mississippi: Annot. Code, 1892, § 2205;

Wisconsin: Ann. St. 1889, § 3996; Wyoming: Rev. St. 1887, § 2259.

⁶ As expressed by statute in Alabama: Code Civ. 1886, § 2439; Arkansas: Rev. St. 1894, § 3613; Connecticut: Gen. St. 1887, § 463; Maine: Rev. St. 1883, ch. 71, § 1; Maryland: Code, 1888, Art. 16, § 56; Missouri: Rev. St. 1889, § 5311.

⁷ *Nesbit v. Miller*, 125 Ind. 106, 109. To similar effect: *Morrison v. Nellis*, 115 Pa. St. 41, 46.

⁸ *Glassgow v. McKinnon*, 79 Tex. 116.

the infants' benefit, and also, under another section, whenever it appears that partition cannot be made without injury and loss to the owners in common, it was held that a bill stating in express terms that the land could not be divided without loss and injury to the parties interested, and that it would be for the advantage of the parties to have it sold, stated a case under the section empowering a sale for partition.¹ In Louisiana the Probate Court can make no order to sell *all* the real estate of a deceased, inherited by minor and major heirs, to pay debts and distribute the proceeds, except on proof that the property cannot be divided in kind.²

That the infant holds title to his land in common with adults, and that the costs of partition would be heavy in comparison with

the value of the estate, has been held sufficient to authorize a sale.³ And so the averment that the

What allegations necessary.

property is unproductive; that the tenants occupying it refuse to pay rent, and are cutting down and destroying trees; that it is subject to heavy taxes which would amount to more than the value of the land when the infant should come of age, are sufficient to invoke the power of the court to order a sale.⁴ But the anticipation of an increased income from investment in personal securities is not a sufficient motive to order the sale of improved farms.⁵

It was intimated in Arkansas, that a sale may be ordered to reimburse a guardian for expenses incurred by him in the maintenance of his ward.⁶ In Alabama the Supreme Court declined to decide whether such power existed in the Probate Court; but held that a court of equity might after his majority subject the real estate of the former ward to sale to reimburse a guardian the necessary expenditures made by him out of his own means for the support of the ward; and that a reference is proper to ascertain the most practical and advantageous method of reimbursement.⁷

The statutes of many States provide for the proof to be made

¹ *Benson v. Benson*, 70 Md. 253, 259. The significance of the distinction lay in the fact, that in case of a sale for better investment a special bond was required, while there was no such requirement for the sale for partition, so that the general bondsmen were liable.

² *Succession of Dumestre*, 40 La. An. 571.

³ *Matter of Congden*, 2 Paige, 566.

⁴ *Fitch v. Miller*, 20 Cal. 352, 384.

⁵ *Matter of Mason*, Hopk. 122.

⁶ But not after the cessation of the guardianship: *Phelps v. Buck*, 40 Ark. 219, 223.

⁷ *Bellamy v. Thornton*, 103 Ala. 404.

before a court can make the order to sell for reinvestment ; it is held, that the sole object of such proof is to satisfy the mind of the court as to the propriety of a decree for sale, and such decree will not be reversed and vacated for mere irregularity in the mode of proof.¹ But in Kentucky, under a statute requiring "that before the court shall have jurisdiction to decree the sale of an infant's real estate, three commissioners must be appointed to report, and must report, the net value of the infant's real and personal estate, and the annual profits thereof, and whether the interest of the infant requires the sale to be made," it was held that a report omitting to state that "the interest of the infant requires the sale to be made," although stating that the sale "would redound to the interest of said heirs," is not sufficient to authorize the sale.²

§ 72. **Who may obtain the Order to sell.**—Neither a natural guardian, as such merely,³ nor the husband of an infant as such,⁴ nor one who falsely represents himself to be a guardian that is not,⁵ or is shown by the record not to be,⁶ can obtain a valid order or license to sell the real estate of an infant, when the statute requires the sale to be made by a guardian. The mere failure of the record to show application by the guardian will not invalidate the proceedings ; the court will presume that such ceremony had been complied with ;⁷ but the sale by one professing to act as guardian whose appointment is absolutely void, is equally void, and passes no title to the purchaser, although he bought in good faith, and without actual notice of any defect in the guardian's appointment, or his authority to sell.⁸ Sales after the majority of a ward have in some rare instances been held valid ;⁹ but, as a rule, sales can be neither authorized¹⁰ nor made after cessation of the guardianship, whether by the death of the ward or otherwise,¹¹ unless the guardian is by statute author-

Order may be obtained by a guardian.

Sales after termination of guardianship.

¹ Gregory v. Lenning, 54 Md. 51, 57.

² Wells v. Cowherd, 2 Metc. (Ky.) 514 ; Bell v. Clark, 2 Metc. (Ky.) 573 ; Mattingly v. Read, 3 Metc. (Ky.) 524 ; Watts v. Pond, 4 Metc. (Ky.) 61.

³ Shanks v. Seamonds, 24 Iowa, 131, 132 ; Graham v. Houghtalin, 30 N. J. L. 552, 559 et seq.

⁴ Dengenhart v. Cracraft, 36 Oh. St. 549, 569.

⁵ Grier's Appeal, 101 Pa. St. 412, 415.

⁶ Higginbotham v. Thomas, 9 Kans.

328 ; McKee v. Thomas, 9 Kans. 343.

⁷ Aldrich v. Funk, 1 N. Y. Supp. 541, 546, and New York cases cited.

⁸ Dooley v. Bell, 87 Ga. 74, relying on Bell v. Love, 72 Ga. 125.

⁹ Webster v. Behinger, 70 Ind. 9, 14.

¹⁰ Phelps v. Buck, 40 Ark. 219, 223.

¹¹ Robertson v. Coates, 65 Tex. 37, 43 ; Alford v. Halbert, 74 Tex. 346.

ized to settle the estate of the deceased ward without letters of administration.¹ In Ohio, the appointment of a guardian to a female under twelve years of age expires by its own limitation on the ward's reaching that age;² and it is there held that the petition of such a guardian, or one that has been such a guardian, for the sale of the ward's real estate, filed after she had attained the age of twelve years, as well as all the proceedings subsequent thereto, are void, and convey no title.³ In California the Supreme Court expressed a doubt whether the legislature has power to authorize the sale, by a stranger, of an infant's real estate, and decided that an act authorizing a person by name, as guardian of a minor, to sell his real estate, and to execute a conveyance, after confirmation of the sale by the Probate Court, contemplates the appointment of such person as guardian by the Probate Court, and the sale by such person without such previous appointment is void.⁴

Sales are in many States, however, authorized by statute to be made on the application of parents, or other suitable persons, as well as of guardians, and courts empowered to direct the sales to be made by any proper person, conditioned, generally, on their giving bond to the Probate Court for the faithful discharge of their functions. So, for instance, in Connecticut,⁵ Delaware,⁶ Maine,⁷ Massachusetts,⁸ New York,⁹ Texas.¹⁰ Where the statute distinguishes between guardians, as having custody of the person, and curators, having charge of the estate, the latter, and not the former, are the proper parties to apply for the sale of the ward's real estate, and to sell the same and apply the proceeds to the education of the minor.¹¹

When an infant becomes a ward in chancery, and it becomes

¹ *Wingate v. James*, 121 Ind. 69, 73.

² *Campbell v. English*, Wright, 119.

³ *Perry v. Brainard*, 11 Ohio, 442.

⁴ *Paty v. Smith*, 50 Cal. 153, 158.

⁵ Gen. St. 1887, § 403.

⁶ Rev. Code, 1874, p. 580, § 22.

⁷ Rev. St. 1883, ch. 71, § 1.

⁸ Publ. St. 1882, ch. 140, § 7.

⁹ Bliss' Code Civ. Procedure, § 2349.

Application may be made by any relative or other person; if the ward is above the age of fourteen years, he must join. If the application is made to the Supreme Court, it must be presented in term within the

judicial circuit in which the land, or a part thereof, lies. Application may, accordingly, be made by a mother, as natural guardian: *Matter of Whittock*, 32 Barb. 48; by the husband of an infant: *Matter of Lansing*, 3 Paige, 265; by an uncle, though he be a creditor: *O'Reilly v. King*, 2 Rob. (N. Y.) 587, 593; see to same effect: *Battell v. Torrey*, 65 N. Y. 294.

¹⁰ Saylor's Tex. Civ. St. 1882, §§ 2572, 2573. If application is by some one other than the guardian, the guardian must be made a party: § 2574.

¹¹ *Duncan v. Crook*, 49 Mo. 116.

necessary to sell his real estate, a trustee is usually appointed to make the sale, who is not permitted, without previous sanction of the court, to apply the proceeds.¹ These trustees are agents or instruments of the court; sales made by them are transactions between the court and the purchasers, and as such are regulated by all the principles of equity applicable to judicial sales.²

§ 73. **Notice of the Application required to be given.** — Although the proceeding in selling infants' real estate is in some States held to be *in rem*, to which no parties are necessary,³ yet it is provided by statute, in most of the States, that notice must be given, so that on the hearing of the application the court may be informed, as far as possible, of the facts on both sides of the question of the necessity or propriety of the sale. In proceedings to subject a decedent's real estate to sale for the payment of debts, in which his creditors or executors or administrators are the moving parties, the notice must be given to the heirs or devisees, whose property is sought to be taken from them, and whose rights cannot, therefore, be affected without giving them an opportunity to be heard.⁴ But when it is proposed to convert the real estate of an infant, there seems but little to be gained by notifying him of the proceeding. Theoretically, he has no capacity at all to judge of what is best for him or for his estate, and to summon him into court is therefore an idle ceremony;⁵ practically, however, especially when he is of an age approximating majority, he may suggest facts and views of policy worthy of consideration by the court in exercising its discretion, and he may appoint an attorney to represent him. Hence, notice to the infant himself is in some States required, before the court can hear the application; for instance, in Illinois,⁶ Iowa,⁷

Trustee in
chancery.

Sale of real
estate is a
proceeding *in
rem*.

Notice of the
application
must be given

to the minor,

¹ Tilly v. Tilly, 2 Bland, 436, 445.

² Bolgiano v. Cooke, 19 Md. 375, 391, citing earlier Maryland cases.

³ Mulford v. Beveridge, 78 Ill. 455, 458; Spring v. Kane, 86 Ill. 580, 582; Gager v. Henry, 5 Saw. 237, 244; Thaw v. Ritchie, 136 U. S. 519, 548, holding that no notice is necessary where the statute requires none. To same effect: Furnish v. Austin, 7 So. W. 399; Florentine v. Barton, 2 Wall. 210, 216; Myers v. McGavock, 58 N. W. 522, 526.

⁴ See Woerner on Adm. § 466.

⁵ Burrus v. Burrus, 56 Miss. 92, 98.

⁶ As appears from Musgrave v. Conover, 85 Ill. 374.

⁷ Haws v. Clark, 37 Iowa, 355, 357; Lyon v. Vanatta, 35 Iowa, 521, 523. In the absence of proof of notice, or of a finding of the court, that notice had been served upon the minor at least ten days before the day of hearing the application, the proceedings are void: Rankin v. Miller, 43 Iowa, 11, 21.

Kansas,¹ Mississippi,² New York,³ Wyoming,⁴ and perhaps others. Most generally, however, it is made the duty of the guardian

applying for the order or license to notify the next
 to the next of kin, and all persons interested,
 of kin of the ward, and all other persons interested
 in the matter (including such persons as would be
 either immediate or remote heirs in case of the in-

fant's death) to appear and show cause why the order or license to sell should not be made. It is, in substance, so provided in California,⁵ Colorado,⁶ Connecticut,⁷ Maine,⁸ Maryland,⁹ Massachusetts,¹⁰ Michigan,¹¹ Minnesota,¹² Mississippi,¹³ Montana,¹⁴ Nebraska,¹⁵ Nevada,¹⁶ Oregon,¹⁷ Pennsylvania,¹⁸ Texas,¹⁹ Vermont,²⁰ and Wisconsin.²¹ In Ohio, on the filing of the petition for

the sale of a ward's real estate, the court is required to direct
 to husband or wife.
 notice to be given to the ward's husband or wife, if
 he have such, as well as to all persons entitled as

¹ Gen. St. 1889, § 3228.

² "It is the well-established practice in chancery to give notice to the minor, either by service of process or by publication, and then to appoint a guardian *ad litem*; and without such notice, either actual or constructive, the court has no jurisdiction:" Per Handy, J., in *McAllister v. Moye*, 30 Miss. 258, 262; *Rule v. Broach*, 58 Miss. 552, 555. But under the statute, process for the minors is held not necessary in probate proceedings for a decree of sale of minors' real estate: *Morton v. Carroll*, 68 Miss. 699, citing earlier cases.

³ In this State a rule in chancery requires the minor, if over fourteen years of age, to join in the application for the sale; but it is held that the court may waive this rule, and it does not affect the jurisdiction: *Cole v. Gourlay*, 79 N. Y. 527, 535. But an order of sale by a surrogate is void, if the infant has not been served with notice before the appointment of a special guardian for him: *Pinckney v. Smith*, 26 Hun, 524. And for a sale by the executor or administrator, notice is required to all persons concerned, which cannot be waived for a minor by a failure to make the objection before the surrogate, or on appeal: *Stilwell v. Swarthout*, 81 N. Y. 109, 114.

⁴ Rev. St. 1887, § 2260.

⁵ Code Civ. Proc. 1885, § 1782.

⁶ Mills' Ann. St. 1891, § 2083.

⁷ Gen. St. 1888, § 463.

⁸ Rev. St. 1883, ch. 71, § 6.

⁹ *Roche v. Waters*, 72 Md. 264, 270.

¹⁰ Publ. St. 1882, ch. 140, § 15.

¹¹ Howell's St. 1882, §§ 6066, 6086.

¹² Gen. St. 1891, § 5784.

¹³ In this State citation must be issued and served upon at least three nearest relatives of the infant, and the sale is void unless such citation and service are shown by the record: *Temple v. Hammock*, 52 Miss. 360, 366; *Fitzpatrick v. Beal*, 62 Miss. 244, 248; *Moody v. McDuff*, 58 Miss. 751.

¹⁴ Code Civ. Pr. 1895, § 3005. A copy of the order of court directing the next of kin to appear must be served upon the next of kin and all persons interested at least fourteen days before the day of hearing, unless they all consent to the sale in writing: § 3006.

¹⁵ Comp. St. 1891, ch. 23, § 48. Same as in Montana. See *Myers v. McGavock*, 58 N. W. (Neb.) 522, 527.

¹⁶ Gen. St. 1885, § 573. Same as in Montana.

¹⁷ Codes and Gen. L. 1887, § 3119.

¹⁸ To all parties legally or beneficially interested, to the guardian, and to the minor himself, or his next of kin, at least thirty days: *Bright. Purd. Dig.* 1883, p. 533, § 126.

¹⁹ Saylor Civ. St. § 2576.

²⁰ St. 1894, § 2794.

²¹ Ann. St. 1889, § 3998.

next of kin to the inheritance, who shall be defendants in the proceeding.¹ In some of the States, the infant, if over fourteen years of age, must answer in person.²

Notice given by a guardian, pursuant to statute, that he will apply to the court for an order to sell the land of his ward at a certain term, does not sustain an application made at a different term; and if no notice has been given for the term at which the order is made, the proceedings will be void for the want of jurisdiction.³ So publi-

Notice good only for the time therein mentioned.

cation for four weeks, less two days, where the statute requires publication for four weeks, is insufficient to give the court jurisdiction to make the order; a sale under such order was held void.⁴ But giving longer notice than is required by the decree does not invalidate the sale;⁵ and where the statute requires publication "for four weeks successively," it is not necessary that the publication be next pre-

Must be given for the full length of time required,

ceding the sale; it will be sufficient if it be for four weeks successively, prior to the sale.⁶ The appearance by the heirs does not cure the defect of the omission to give the notice required by the statute; for minors can waive no right.⁷ But where a guardian reports that he was unable to sell under an order made upon proper notice, and prays for an amendment of the terms of sale allowing him to sell on credit, it is competent for the court to make such amendment without new notice.⁸ Where a notice has in fact been given, its sufficiency cannot be collaterally questioned;⁹ and where the notice required by the statute to be given before the sale can be ordered, is intended for the protection of parties having adver-

but sufficiency cannot be questioned collaterally.

¹ Rev. St. 1890, § 6282.

² So in Tennessee: Code, 1884, § 4056; Virginia: *Cooper v. Hepburn*, 15 Gratt. 551, 565.

³ *Knickerbocker v. Knickerbocker*, 58 Ill. 399; *Haws v. Clark*, 37 Iowa, 355; *Lyon v. Vanatta*, 35 Iowa, 521, 524.

⁴ *Mohr v. Tulip*, 40 Wis. 66, 76. This was the case of a lunatic; and was in effect overruled by the Supreme Court of the United States in *Mohr v. Manierre*, 101 U. S. 417, on the ground that the notice required was for the protection of the lunatic, and not essential to give the court jurisdiction. It was overruled on the same ground by the Supreme Court of

Wisconsin in *Mohr v. Porter*, 51 Wis. 487, adopting the view of the Supreme Court of the United States.

⁵ *Morton v. Carroll*, 68 Miss. 699, 702.

⁶ *Walker v. Goldsmith*, 14 Oreg. 125, 145.

⁷ *Kennedy v. Gaines*, 51 Miss. 625, 629.

⁸ *Reid v. Morton*, 119 Ill. 118, 132.

⁹ *Cooper v. Sunderland*, 3 Iowa, 114, 136; *Sheldon v. Wright*, 5 N. Y. 497, 514; *Borden v. State*, 11 Ark. 519; *Dexter v. Cranston*, 41 Mich. 448, 451; *Bunce v. Bunce*, 59 Iowa, 533, 535; *Howbert v. Heyle*, 47 Kans. 58, 63; *Stampley v. King*, 51 Miss. 728, 730; *Hamiel v. Donnelly*, 75 Iowa, 93.

sary interests in the property, the party for whose benefit the sale was made, cannot object to its validity for the want of proper notice.¹ The return of a sheriff "summoned" or "executed" may be a sufficient return under the requirements of a statute,² but if the sheriff attempt to show *how* he had executed the summons, and in doing so shows that he has not complied with the directions of the law, such service is insufficient.³ An affidavit of publication, made by the book-keeper of the newspaper, instead of the printer, foreman, or clerk, as required by statute, is not evidence of the publication, if objected to in time, but where it is introduced without objection, and no assignment of error is based thereon, it cannot be permitted to be objected to for the first time on appeal.⁴ An affidavit by the proprietor is sufficient, although the statute requires one by the "printer" or "foreman" of the newspaper in which publication has been made;⁵ but recital in the order of sale that it appeared to the judge "that the notice had been published" in a newspaper named, is no sufficient evidence of the publication.⁶

It was held in Mississippi that a chancery decree for the sale of a minor's land cannot be impeached collaterally, if the order appointing a guardian *ad litem* recites that summons was duly executed on the minor, although the only summons shown by the record was served, not on him, but on a person erroneously styled his guardian.⁷ Proof by affidavit of the person having served it, though not an officer, is sufficient proof of service of notice.⁸

§ 74. **Requirements of the Petition for the Order of Sale.** — Where the sale is sought to be effected through the chancery powers of a court possessing jurisdiction for this purpose, the proceeding will, of course, conform to the rules governing bills in equity, unless the statute authorizes a different course.⁹ Sales through the medium of

¹ *Mohr v. Manierre*, 101 U. S. 417; *Mohr v. Porter*, 51 Wis. 487.

² *Burrus v. Burrus*, 56 Miss. 92, 94, overruling (p. 96) *Mundy v. Calvert*, 40 Miss. 181.

³ *Burrus v. Burrus*, 56 Miss. 92, 96.

⁴ *Schlee v. Darrow*, 65 Mich. 362, 373.

⁵ *Reynolds v. Schmidt*, 20 Wis. 374, 381.

⁶ *Gibbs v. Shaw*, 17 Wis. 197, 201.

⁷ *Cocks v. Simmons*, 57 Miss. 183.

⁸ *Howbert v. Heyle*, 47 Kans. 58.

⁹ That the sale of infants' real estate may be ordered by a chancery court in a proceeding on petition, as well as by bill, is held in several States: *Elrod v. Lancaster*, 2 Head, 571, 576; *Winchester v. Winchester*, 1 Head, 460, 490, reviewing earlier Tennessee cases; *Skinner's Heirs*, 2 Dev. & B. Eq. 71.

courts of probate jurisdiction are in all the States governed by statutory regulations. In most, but not in all, instances the statute does not distinguish between sales for the payment of debts, for support and education of the infant, or for a more profitable investment of the proceeds so as to require a difference in the method of proceeding. Where such distinction exists, it is necessary that the particular purpose for which the sale is asked should be specifically stated in the petition.¹ It is, indeed, safest to recite the true reason upon which the necessity or propriety of the sale is based, whether this is required in express terms by the statute or not. It is held that the petition must set forth the true condition of the estate, and the existence of one or more of the exigencies authorizing the court to make the order of sale.² The petition must affirmatively show that the ward resides in the county where it is filed, though the estate be in a different county.³ But if it appear that the court which made the order had jurisdiction of the subject-matter and of the ward whose property was sold, then a mere defect or informality in the petition, in not setting forth specifically the matters required by the statute, does not deprive the court of jurisdiction, if it show substantial reasons for a sale.⁴ If the petition states a valid ground for the sale, it is not rendered insufficient by the insertion of another insufficient ground.⁵ A petition not reciting all the facts, nor containing an accurate description of the real estate, is not for that reason void on its face,⁶ or collaterally assailable.⁷ If the court hold a defective petition sufficient to authorize an order of sale, it may be error, but does not affect the jurisdiction.⁸ So, if the

In probate courts by statute.

Reason for the sale should be stated in the petition.

Not collaterally assailable for omission of details.

¹ See *ante*, § 71.

² *Fitch v. Miller*, 20 Cal. 352, 382; *Young v. Lorain*, 11 Ill. 624, 636; *Lidner v. Holmes*, 2 Ind. 629; *Nichols v. Lee*, 10 Mich. 526, 529.

³ *Loyd v. Malone*, 23 Ill. 43, 47.

⁴ *McKeever v. Ball*, 71 Ind. 398, 405; *Howbert v. Heyle*, 47 Kans. 58, 62; *Meikel v. Borders*, 129 Ind. 529; *Ryder v. Wood*, 8 N. Y. Supp. 421; *Schaale v. Wasey*, 70 Mich. 414, citing numerous Michigan cases, 417; *Satcher v. Satcher*, 41 Ala. 26, 39, approved and followed in *Smitha v. Flournoy*, 47 Ala. 345, 359; *Wright v. Ware*, 50 Ala. 549, 557; *Bunce v. Bunce*, 59 Iowa, 533, 537.

⁵ *Walker v. Goldsmith*, 14 Oreg. 125, 143.

⁶ *Stuart v. Allen*, 16 Cal. 473, 503.

⁷ *Young v. Lorain*, 11 Ill. 624, 637.

⁸ *Worthington v. Dunkin*, 41 Ind. 515, 521 (it is so announced in the syllabus of the reporter, but the case was decided under a statute directing that such sale shall not be avoided for any irregularity or defect in the proceeding, under certain conditions held to exist in the case, p. 520); to similar effect: *Dequindre v. Williams*, 31 Ind. 444, 455; *Nesbit v. Miller*, 125 Ind. 106, 109; *Weems v. Masterson*, 80 Tex. 45, 53, citing earlier Texas cases.

petition contains the statement of facts upon which the statute authorizes the sale, the jurisdiction is not affected by the fact, that some of the statements are untrue.¹ It has also been held, that the petition is merely the means of procuring process and of presenting the particular ground on which a decree of sale is asked, and although the statute provide that the petition shall be verified by oath, it is not necessary to a valid exercise of the power of the court to decree a sale, that the petition should be sworn to;² but in most States the statutes prescribe with great minuteness what must be stated in the petition, requiring it, generally, to be sworn to, and it is said, that although there be no express provision to the effect, yet it must necessarily be in writing and made part of the record of the case.³

Petition must conform to statutory requirements, and be in writing.

It is held that where an order of sale is based upon a petition appearing of record, which prays for the order on an illegal ground, there is no room for the presumption which might arise if the order stood alone, that some legal cause had been made known to the court upon which the order was based; such a presumption cannot be indulged against proof appearing affirmatively on the record, and not impeached by the order itself.⁴

The petition must set out a description of all the real estate of the ward;⁵ the order, based upon the petition, must be in itself sufficient, the land to be sold must be described so as to make it definite and certain without reference to extraneous matter.⁶ But a misdescription does not deprive the court of jurisdiction, or make the sale absolutely void.⁷ And so it is held that the validity of a sale is not affected by the circumstance that it does not affirmatively appear on the record that the guardian had presented a petition asking for such an order;⁸ and in California, that while a peti-

Must describe the real estate.

Misdescription not fatal.

¹ *Lynch v. Kirby*, 36 Mich. 238, 241.

² *Williamson v. Warren*, 55 Miss. 199, 202; *Hamiel v. Donnelly*, 75 Iowa, 93, 95.

³ Dictum by Maxwell, Ch. J., in *State v. Dodge Co.*, 20 Neb. 595, 602.

⁴ *Glassgow v. McKinnon*, 79 Tex. 116, 117, relying on *Withers v. Patterson*, 27 Tex. 491, 496.

⁵ *Mauarr v. Parrish*, 26 Oh. St. 636, 639, holding that until the contrary is shown the court must presume that in this

respect the petition conforms to the statutory requirement.

⁶ *Hill v. Wall*, 66 Cal. 130, 132, relying on *Crosby v. Dowd*, 61 Cal. 557, 601 (this latter case turning upon the sufficiency of the description in a mortgage sought to be foreclosed).

⁷ *Mauarr v. Parrish*, *supra*; *Robertson v. Johnson*, 57 Tex. 62, 64, on the authority of *Wells v. Polk*, 36 Tex. 120, 126.

⁸ *Robertson v. Johnson*, 57 Tex. 62, 64.

tion for the purpose of educating and maintaining the ward must state the condition of the ward's whole estate, real and personal; yet if on the ground of expediency for better investment of the proceeds, it need only to show the condition of the estate to be sold, and in such case the omission to describe the personal estate will not affect the question of jurisdiction.¹

§ 75. **What Interest in Lands of Minors may be sold.** — The powers of courts of chancery to order the sale of real estate of infants, where such power is inherent in them and not derived under a statute, is distinguishable from that exercised by probate courts, or by chancery courts in such States in which their jurisdiction is held to be granted by the legislature. In the latter case the power so delegated must be exercised in strict conformity with the statutory requirements; in the former the courts act in accordance with equitable principles, untrammelled by statutory restrictions.² Thus, while they have inherent power to order the sale of equitable interests of minors in real or personal property,³ and may be empowered by statute to compel infants seized or possessed of lands in trust for others to convey them to other persons in such manner as the court may direct;⁴ yet if they derive their powers from a statute, they are bound by its provisions to the same extent as probate courts in ordering the sale of real estate of minors. The sale of such in accordance with the order of a chancery court contrary to the provisions of a devise, under a statute excepting property so held from the grant of power to the court, is utterly void, passing no title by the deed given in accordance therewith.⁵ A sale of land of which the minors are not seized, is without jurisdiction of the Chancery Court ordering it, and for that reason void.⁶ So it was held in a *nisi prius* case,

Distinction between powers of chancery and of probate courts to order sale of real estate.

Chancery courts governed by statutory conditions.

¹ Smith v. Biscailuz, 83 Cal. 344, 346.

² Hurt v. Long, 6 Pickle, 445, 449. As to inherent chancery power over the real estate of infants, see *ante*, § 68.

³ Per Senator Verplanck in Cochran v. Van Surly, 20 Wend. 365, 380; Wood v. Mather, 38 Barb. 473, 482; Anderson v. Mather, 44 N. Y. 249, 260.

⁴ Anderson v. Mather, 44 N. Y. 249, 259. But infants will not be compelled to enter into any personal covenant in a de-

cree to complete a sale covenanted by an ancestor: Ellison, *in re*, 5 Johns. Ch. 261. And for the conveyance of land held by an infant trustee, under order of the court of chancery, the *cestui que trust* must pay the costs: Sutphen v. Fowler, 9 Paige, 280, 282.

⁵ Rogers v. Dill, 6 Hill (N. Y.), 415, 417; Muller v. Strupman, 6 Abb. N. C. 343, 348.

⁶ Baker v. Lorillard, 4 N. Y. 257, 266.

that a sale of land of which the infant owner was seized neither in deed nor in law is void, because estates in expectancy and in remainder cannot be sold under a statute authorizing the sale of land of which the minor may be seized or entitled to a term of years;¹ but on appeal this view was overruled by the court of

last resort in New York, holding that the term "real estate" includes every freehold estate and interest in lands, and that "a right of present enjoyment

of an estate, or an actual possession, either by a termor or otherwise, is not necessary to a seizin when there is a fixed vested right of future enjoyment, that is, when there is a vested remainder or reversion."² In a subsequent case the power of the

court to order the sale of an infant's real estate was extended to a contingent remainder.³ In the absence of such statutory restrictions probate courts, as well as courts of chancery, may order the sale or mortgage of reversionary interests of minors;⁴

and the impossibility of carrying out the provisions of a will is held to confer jurisdiction on a chancery court for decreeing the sale of real estate devised

to minors, although the will directs that no sale take place until the youngest attains majority.⁵ That a lien existed on the property sold, does not affect the validity of the sale, even in a direct attack, although the purchaser obtained an order to have the purchase price retained in court to meet an alleged incumbrance on the land, without appointment of a guardian *ad litem*.⁶ Or-

ordinarily, the rights of persons having no notice of the sale or order of sale are not thereby affected;⁷ hence, a sale of lands by order of the Chancellor, by virtue

of an act authorizing the sale of lands limited over or in contingency, only conveys the estate of persons having vested or contingent estates in such lands, and who, by the statute, are required to have notice of the proceedings; the rights of incumbrancers are not affected.⁸

¹ Jenkins v. Fahey, 11 Hun, 351, 353; Baker v. Lorillard, *supra*.

² Jenkins v. Fahey, 73 N. Y. 355, 362. To same effect: Cooper v. Hepburn, 15 Gratt. 551; Bell v. Clark, 2 Metc. (Ky.) 573, 575; Thaw v. Ritchie, 136 U. S. 519, 545.

³ Dodge v. Stevens, 105 N. Y. 585, 588.

⁴ Foster v. Young, 35 Iowa, 27, 40.

⁵ Southern Marble Co. v. Stegall, 15 South E. Rep. (Ga.) 806; Rakestraw v. Rakestraw, 70 Ga. 806; Sharp v. Findley, 71 Ga. 654, 663.

⁶ Hurt v. Long, 6 Pickle, 445, 463.

⁷ As to the necessity of notice, see *ante*, § 73.

⁸ Cool v. Higgins, 23 N. J. Eq. 308, 311.

It is a well-known rule, applicable in law as well as in equity, that the interests of parties not before the court will not be bound by the judgment or decree rendered by such court. Hence, it has been held that chancery courts have no power to affect the title of unborn children.¹ But in respect of possible parties not *in esse*, — where the interests of the parties in being require a decree which will completely and finally dispose of a subject-matter in litigation, — convenience, necessity, and justice require the application of the doctrine of representation as an exception to the general rule. Such persons cannot, of course, be brought before the court; and to require that the rights of all the parties in being should be required to await the possible birth of new claimants until the possibility of such birth has become extinct would not only be highly inconvenient, but positive injustice, involving, it may be, the sacrifice of, or heavy loss to the interests of all concerned, including the possible claimants not *in esse*. Hence, such parties not in being are bound by the decree affecting a trust estate for the benefit of certain persons and their children, born or to be born, rendered by a court of competent jurisdiction in a suit to which the trustee and all living beneficiaries are parties.² So the court has power to bar, by its decree, the interests of unborn contingent remainder-men, and of contingent remainder-men residing abroad, whose names and places of residence are unknown.³ The interest of unborn remainder-men is contingent, since the condition upon which they take may never happen; and contingent remainder-men are not necessary parties in proceedings affecting the title to the estate, being represented by the intervening owners.⁴

¹ Downin v. Sprecher, 35 Md. 474, 479. By a statute passed in 1862, however, courts of equity were authorized to decree the sale of real estate, in a proper case, and it was provided that such sale should bind all parties *in esse* or born thereafter: Rie-
man v. Von Kapff, 76 Md. 417. A similar view to that held in Downin v. Sprecher was suggested as possible, but not announced, in Baker v. Lorillard, 4 N. Y. 257, 266. So the sale of land by a guardian, which land was held by a trustee, passes no title: Penniman v. Sanderson, 13 Allen, 193.

² Hale v. Hale, 146 Ill. 227, 259; Franklin Savings Bank v. Taylor, 53 Fed.

R. 854, 867 *et seq.*; Reinders v. Koppelman, 68 Mo. 482, 501, approved and followed in Sikemeier v. Galvin, 124 Mo. 367, 371; Miller v. Texas Railway, 132 U. S. 662, 671 *et seq.*; Faulkner v. Davis, 18 Gratt. 651, 684 *et seq.*

³ Bofil v. Fisher, 3 Rich. Eq. 1, 7, relying on the case of Giffard v. Hort, 1 Sch. & Lef. 386, 408, in which Lord Redesdale said that "this is now considered the settled rule of courts of equity, and of necessity."

⁴ Temple v. Scott, 143 Ill. 290, 295, reviewing many authorities; Bailey v. Hoppin, 12 R. L. 560. See also McCampbell v. Mason, 151 Ill. 500, 510.

There seems to be no substantial reason why any interest of a minor in any kind of property should not be subject to be sold, if a court of competent jurisdiction finds such a sale to be necessary for the education, maintenance, or well-being of the minor.¹ It is no objection to such a sale, that the minor owns an undivided title only, and that the other owners of the undivided tract refuse to sell.² That equitable as well as legal estates, in possession as well as in expectancy, reversions, remainders, &c., may be sold, under order of a court having jurisdiction, if such sale appear to be necessary or beneficial to the infant owner, seems to follow from what has been above stated.³

But it may be unwise to sell the real estate of a minor in a case where a serious question of title may be raised; it might deter bidders, and result in a sacrifice of the property. An order to sell under such circumstances will be revoked on the motion of a party in interest.⁴

The peculiar nature of a minor's interest in the homestead of a deceased parent gives rise to some doubt touching the power of probate courts to order the sale of such homestead rights. In so far as the minor's interest in the descended homestead is considered, apart from his property in the land as such without reference to its character as homestead, it cannot in an absolute sense be said to be an estate in land; the law creating the homestead right leaves the fee intact, its purpose being to secure a homestead for the surviving family: so long as the property serves this purpose, the minor's interest retains this peculiar character, and is within the protection of the law exempting it from sale, and from the claims of adult heirs or devisees; but this character is lost by abandonment or surrender.⁵ The object of the law being to secure a fixed home for the family, "it is not the policy of the law," says Jackson, J., in *Whittle v.*

Any interest in lands of a minor may be ordered sold, if necessary.

Doubt as to homestead interest of minors.

Policy to hold homestead inalienable.

¹ *Bolgiano v. Cooke*, 19 Md. 375, 393.

² *Gilmore v. Rodgers*, 41 Pa. St. 120, 128.

³ "There is the same reason for subjecting estates of infants in remainder or reversion to the jurisdiction of the court, and authorizing a sale when the interests or necessities of the infant require or make a sale expedient, as estates in actual pos-

session:" *Jenkins v. Fahey*, 73 N. Y. 355, 364, approved in *Dodge v. Stevens*, 105 N. Y. 585, 590, which reverses a decision of the lower court (40 Hun, 443, 450) that a mere possibility of an estate in an infant cannot be sold.

⁴ *Moore's Minors*, 9 Phila. 326.

⁵ *Black v. Curran*, 14 Wall. 463; *Hicks v. Pepper*, 1 Baxt. 42, 45.

Samuels,¹ "to encourage the alienation of that home."² It would follow from this aspect of the question, that in the absence of statutory authorization courts, — at least probate courts — have no power to authorize the sale of a minor's homestead rights, since the operation of the sale would be to destroy the purpose of the law. Under a sale by order of the Probate Court "subject to the homestead exemption for the benefit of the family," the purchaser becomes the owner in fee of the whole tract, subject to the homestead exemption descending to the minor children, upon the termination of which, by the majority of the youngest child of the deceased, he is entitled to the possession of the whole.³ This view of the inalien-
Statute of Illinois.
able nature of the homestead exemption may be affirmatively expressed by statute, as it has been in Illinois.⁴

On the other hand, the homestead right descending to the widow and minor children is not an exemption merely, but an affirmative right which possesses the quality of an estate, and is not conditioned upon the occupancy by
Policy to subject minor's homestead rights to sale.
the widow or children, as is the case of the homestead exemption during the lifetime of the parents.⁵ If such estate be sold by order of a probate court to pay debts of the deceased owner, the sale is subject to the homestead rights of the widow and minor children, and the purchaser is liable to account to them. The death of the widow before the majority of the minors does not deprive them of their homestead right,⁶ nor, of course, can the sale under a foreclosure of a mortgage given by the widow have such effect.⁷ Since the minors would have the right to recover in ejectment, if deforced of their homestead right, against the widow's vendee,⁸ they could recover rents and profits by way of damages; and they are entitled to receive

¹ 54 Ga. 548, 550.

² The case accordingly decides that the sale of the homestead by a widow, the executor of the deceased husband consenting thereto and joining in the deed under authority given by the will, the ordinary approving such sale, conveyed no title to the purchaser.

³ McCaleb v. Burnett, 55 Miss. 83.

⁴ "Such exemption shall continue after the death of such householder, for the benefit of the widow and family, some or one of them continuing to occupy such

homestead until the youngest child shall become twenty-one years of age, and until the death of such widow." General Laws Ill. 1857, p. 576, § 1.

⁵ Hufschmidt v. Gross, 112 Mo. 649 656; West v. McMullen, 112 Mo. 405, 411, citing earlier Missouri cases and disapproving Kaes v. Gross, 92 Mo. 647.

⁶ Canole v. Hurt, 78 Mo. 649.

⁷ Kochling v. Daniel, 82 Mo. 54; Rogers v. Mayes, 84 Mo. 520.

⁸ Roberts v. Ware, 80 Mo. 363.

their share of the money representing the homestead, sold by order of the Probate Court, even after they have reached majority.¹ Under this aspect of the question, and remembering that a homestead right descending from a deceased parent may be the only property owned by a minor, it would appear that the court having jurisdiction over the estate of such minor should be possessed of the power to order the sale of such homestead right, if it be necessary for his education, maintenance, or well being.² Like the personal property which the statute exempts from seizure by creditors to protect indigent debtors, the usefulness of a homestead to an indigent minor might depend entirely upon the right of his guardian to sell it, for the want of which the minor might suffer. Hence, such homestead right of minors ought to be subject to sale like any other property owned by them.³

It is provided by statute in Minnesota, that if a minor have a husband or wife, his or her homestead cannot be sold without the consent of the spouse; the interest of a husband or wife in the homestead estate is not affected by a sale in which such husband or wife has not joined.⁴

§ 76. **Special Bond and Oath required.** — In many States the authority to order the sale of real estate of minors is conditioned upon the giving of a special bond by the guardian to secure the faithful accounting for the proceeds of the sale. Among those whose statutes require such a bond may be named California,⁵ Connecticut,⁶ Delaware,⁷ Indiana,⁸ Iowa,⁹ Kansas,¹⁰ Kentucky,¹¹ Maine,¹² Michigan,¹³ Minnesota,¹⁴ Mississippi,¹⁵ Montana,¹⁶ Nebraska,¹⁷ Nevada,¹⁸ New

¹ *Hufschmidt v. Gross*, 112 Mo. 649, 660.

² It is held in Mississippi that the interest of children in a homestead is subject, even during the life of the widow, to be sold by the guardian, under order of the Probate Court, just as other lands belonging to them: *Morton v. McCauley*, 68 Miss. 810, citing *McCaleb v. Burnett*, 55 Miss. 83.

³ See Thompson on Homestead & Exemptions, § 738.

⁴ Gen. St. 1891, § 5794.

⁵ Code Civ. Pr. 1885, § 1788.

⁶ Gen. St. 1887, § 463.

⁷ Rev. Code, 1874, p. 580.

⁸ Rev. St. 1888, § 2532.

⁹ McClain's Ann. Code, 1888, § 3452.

¹⁰ *Morris v. Cooper*, 35 Kans. 156.

¹¹ *Barnett v. Bull*, 81 Ky. 127. But bond is not necessary to an order of sale under the law directing a sale where the infant is co-tenant with another, and there can be no division without injuring the property: *Shelby v. Harrison*, 84 Ky. 144, 148.

¹² Rev. St. 1883, ch. 71, § 4.

¹³ Howell's Ann. St. 1882, § 6064.

¹⁴ Gen. St. 1891, § 5798.

¹⁵ *Vanderburg v. Williamson*, 52 Miss. 233.

¹⁶ Comp. St. 1888, § 387.

¹⁷ Comp. St. 1891, ch. 23, § 54.

¹⁸ Gen. St. 1885, § 579.

Hampshire,¹ New York,² Ohio,³ Oregon,⁴ Pennsylvania,⁵ Vermont,⁶ Wisconsin,⁷ Wyoming,⁸ besides, probably, others not here enumerated. The reason for requiring separate or special bonds of guardians is not so controlling as it is in the case of executors and administrators, for Reason for special bond by guardian. in most States, as at common law, executors and administrators take no title to the real estate of their decedents until the court having jurisdiction over them direct them to take charge of it for the purpose of paying debts in case of the insufficiency of personal assets; hence, the bond given originally is not supposed to cover liability for the proceeds of the sale of real estate; but guardians take title to neither the real nor personal estate of their wards,⁹ but only the right of possession and control. There remains, therefore, as the substantial reason for the requirement of a special bond to cover the proceeds of sale of real estate of minors, the consideration, that by reason of the immobility of real estate, and the lack of authority in the guardian to alienate it without order of the court, its value is not usually included in the amount for which security is required by the general guardianship bond. It is for this reason that the sureties on the general bond are not held liable for the misappropriation of the proceeds of real estate,¹⁰ and because, as is held in some of the States, no title passes under a sale made by a guardian whose authority is conditioned either by the statute or the order of the court on the giving of a special bond, and who has not given such bond.¹¹

Although this bond should be executed after the order of sale is granted, and should refer to it, yet it is held not void because it was signed and acknowledged previously.¹² The Bonds held sufficient. bond is sufficient if in substantial compliance with

¹ If the guardian's general bond be insufficient: Publ. St. 1891, ch. 177, § 10.

² Special guardian is to be appointed, who must give bond: Bliss' Code Civ. Pr. § 2352.

³ Rev. St. 1890, § 6285.

⁴ Codes and Gen. L. 1887, § 3122.

⁵ *Blanser v. Diehl*, 90 Pa. St. 350.

⁶ If the court requires: St. 1894, § 2794, ¶ III.

⁷ Ann. St. 1889, § 4004.

⁸ Rev. St. 1887, § 2263.

⁹ *Ante*, § 53.

¹⁰ *Colburn v. State*, 47 Ind. 310, 312,

reviewing earlier Indiana cases; *Morris v. Cooper*, 35 Kans. 156, 161; and authorities, *ante*, § 41.

¹¹ *Barrett v. Churchill*, 18 B. Mon. 387, 390; *Barnett v. Bull*, 81 Ky. 127, 128; *Stewart v. Bailey*, 28 Mich. 251; *Ryder v. Flanders*, 30 Mich. 336, 343; *Williams v. Morton*, 33 Me. 47, 50; *McKeever v. Ball*, 71 Ind. 398; *Weld v. Johnson Mfg. Co.*, 84 Wis. 537, 541. And see authorities cited *ante*, § 41, under the subject of the relative liability of sureties on general and on special guardian's bonds.

¹² *Center v. Finch*, 22 Hun, 146, 149.

statute.¹ If the bond be filed in the proper place designated by the statute, it is immaterial that the order erroneously directed it to be filed elsewhere.² Such bond is held to be a writing obligatory, in a definite sum on the condition therein specified, the amount thereof such as the judge may direct, and with such sureties as he may approve; and no one will be heard to question the

Validity of sale
impeachable
for lack of spe-
cial bond by
minor only. validity of a guardian's sale for the want of sufficient security, except the ward, or some one claiming under him.³ Hence, although the guardian's sale without having given bond does not divest the ward's interest

or title, if he has not afterward accounted for the proceeds,⁴ yet if he faithfully accounts for the proceeds of the sale, the ward has no equity upon which to invoke the aid of a court to set aside the sale.⁵ So where the statute provides that if the purchase-money be not paid it shall remain a lien on the land until the majority of the ward, or until the guardian has given bond, the failure to give the special bond before the order of sale does not invalidate it.⁶

So it is held, in some States, that the sale of real estate of minors, by guardians who have not given the special bond, is

Sale held erro-
neous, but not
void. erroneous, but not void,⁷ and can be avoided only in a direct proceeding to set it aside,⁸ and that, where

the guardian accounted for the surplus of the proceeds of the sale, and they went to the benefit of the ward, the sale will not be disturbed in a collateral proceeding on the ground that the bond filed was not formally approved.⁹

In many States it is likewise provided that before the sale the guardian shall take an oath that he will, to the best of his ability,

Oath of good
faith required. conduct the sale in such manner as shall be most for the advantage of those who are interested. Such

¹ *McGale v. McGale*, 29 A. (R. I.) 967.

² *Ryder v. Wood*, 29 N. Y. St. Rep. 62, 64.

³ *Goldsmith v. Gilliland*, 10 Sawy. 606, 613.

⁴ *McKeever v. Ball*, 71 Ind. 398.

⁵ *Marquis v. Davis*, 113 Ind. 219, 221, citing earlier Indiana cases; *Orman v. Bowles*, 18 Colo. 463, 472.

⁶ *Shelby v. Harrison*, 84 Ky. 144, 149.

⁷ *Mauarr v. Parrish*, 26 Oh. St. 636, 638, approved and followed in *Arrowsmith v. Harmoning*, 42 Oh. St. 254, 259, in turn

followed in *Arrowsmith v. Gleason*, 129 U. S. 86, 95; *Watts v. McCook*, 24 Kans. 278, affirmed in *Howbert v. Heyle*, 47 Kans. 58, 64; *Lockhart v. John*, 7 Pa. St. 137, affirmed in *Dixey v. Laning*, 49 Pa. St. 143, 146 (this case concerns sale by an administrator); *Bunce v. Bunce*, 59 Iowa, 533, 537, approved in *Hamiel v. Donnelly*, 75 Iowa, 93; *McKinney v. Jones*, 55 Wis. 39, 47; *Marquis v. Davis*, 113 Ind. 219, 221.

⁸ *Davidson v. Bates*, 111 Ind. 391, 401.

⁹ *Emery v. Vroman*, 19 Wis. 689, 700.

oath is required, among others, in the States of Iowa,¹ Maine,² Michigan,³ Minnesota,⁴ Nebraska,⁵ New Hampshire,⁶ Oregon,⁷ Vermont,⁸ and Wisconsin.⁹ It is sufficient if the oath taken by the guardian is in substantial compliance with the form prescribed by the statute; a difference in mere wording, or phraseology, not materially changing the sense, will not vitiate it.¹⁰ But a sale of land by a guardian is held invalid if the record fail to show that he took the oath required;¹¹ and, although the oath was taken before the sale was made, yet the sale is invalid unless it was taken at the time fixed by the statute; the subsequent approval of the sale by the court does not make it valid.¹² But if the oath, dated before the sale was made, be found among the regular files of the Probate Court, the omission of the judge to indorse upon it the fact and date of its filing is not material.¹³

It was decided in Michigan, that where the guardian died after making sale, reporting it to the court, and after the court had confirmed the sale and ordered conveyance, his successor may be directed to complete the transaction by deeding and receiving the purchase price; and that the oath required in connection with the sale of a ward's real estate need not be taken by the successor.¹⁴

§ 77. **Appointment of Guardians ad litem, or Special Guardians.** — The statutes of some States provide for the appointment of a special guardian, or guardian *ad litem*, if no one duly authorized appears for the infant, to represent him in the proceedings for the sale of his property. So it may be the duty of the court to appoint a guardian *ad litem*, — for instance, in Maryland,¹⁵ Tennessee,¹⁶ and Virginia,¹⁷ — whose

Sale void if
oath not taken

at the time
fixed by
statute.

On death of
guardian after
sale, successor
to make deed
without taking
oath.

Guardian *ad
litem*, if minor
is not repre-
sented.

¹ Frazier v. Steenrod, 7 Iowa, 339, 342.

² Rev. St. 1883, ch. 71, § 5.

³ Howell's Ann. St. 1882, § 6072.

⁴ Gen. St. 1891, § 5796.

⁵ Comp. St. 1891, ch. 23, § 55.

⁶ Publ. St. 1891, ch. 177, § 12.

⁷ Codes and Gen. L. 1887, § 3123.

⁸ St. 1894, § 2794, ¶ III.

⁹ Ann. St. 1889, § 4004.

¹⁰ Frazier v. Steenrod, 7 Iowa, 339, 342.

¹¹ Wilkinson v. Filby, 24 Wis. 441, 444.

¹² Blackman v. Baumann, 22 Wis. 611, 613.

¹³ West Duluth Land Co. v. Kurtz, 45 Minn. 380, 382.

¹⁴ Lynch v. Kirby, 36 Mich. 238.

¹⁵ Gill v. Well, 59 Md. 492, 499; Roche v. Waters, 72 Md. 264, 269.

¹⁶ Code, 1884, § 4055. If the minors have no general guardians; and such guardian *ad litem* may be appointed by the clerk or master in chancery: Beaumont v. Beaumont, 7 Heisk. 226, 227.

¹⁷ Code, 1887, § 2618. If the minor is above the age of fourteen, he, as well as

duty it is to represent the infant's interests; or to appoint a referee to inquire into the merits of the application for the sale of a minor's lands, and report to the court, as in New York,¹ Kansas,² and Wyoming;³ and it is held in North Carolina that the sale of an infant's land ought not to be decreed by a court of equity upon *ex parte* affidavits, without a reference to ascertain the necessity and propriety of the sale, either by a referee's report or the trial of an issue.⁴ In Pennsylvania the court may appoint some suitable person to investigate the facts, and report on the expediency of making a sale or mortgage of the infant's real estate.⁵ In Mississippi, under a statute prior to 1857, the Probate Court had no power to appoint a guardian *ad litem* without previous citation to the infant whose land was sought to be sold;⁶ but by the Code of 1857, chancery courts were inhibited from making such appointment without previous notice to the minor, while probate courts were held to have such power;⁷ and the sale of lands without notice to the minor was held void.⁸ So it was held error, in Virginia, to decree a sale without an answer, marked "filed," by the guardian *ad litem*, although the minor had a general guardian, and a guardian *ad litem* had been appointed.⁹

The current of authority, however, is decidedly to the effect, that in the absence of statutory provision on the subject, the appointment of a guardian *ad litem* is improper where the infant has a general guardian.¹⁰ The appointment of such guardian in a chancery court was held necessary in Illinois, although the petition for the sale of the land had been filed by the regular guardian of the infant;¹¹ but in a later case this ruling was criticised as going too far, and the law stated to be, that the ward was not entitled to summons on the

his guardian *ad litem*, must answer in person.

¹ Bliss' Code Civ. Pr. § 2354; Ellwood v. Northrup, 106 N. Y. 172.

² Gen. St. 1889, § 3230.

³ Rev. St. 1887, § 2262.

⁴ Harrison v. Bradley, 5 Ired. Eq. 136, 144.

⁵ Bright. Purd. Dig. 1883, p. 533, § 124.

⁶ McAllister v. Moye, 30 Miss. 258, 262.

⁷ Burrus v. Burrus, 56 Miss. 92, 97; Rule v. Broach, 58 Miss. 552, 555.

⁸ Rule v. Broach, *supra*; and where some minors had notice, and others not, the sale was held void even as to those who had been properly notified: Hamilton v. Lockhart, 41 Miss. 460, 478.

⁹ Ewing v. Ferguson, 33 Gratt. 548, 562.

¹⁰ See, on this subject, *ante*, § 21, p. 63, also p. 65.

¹¹ Loyd v. Malone, 23 Ill. 43, 47. To similar effect: *In re Sturms*, 25 Ill. 390.

application of her guardian for an order to sell her land; nor to a guardian *ad litem*, unless by the suggestion of some one as *amicus curiæ* it should appear that the guardian was about to abuse his trust, or seeking to injure and mis-apply the estate.¹ So it is held in Georgia,² Colorado,³ and Kentucky,⁴ that a guardian *ad litem* need not be appointed, where the statute does not require it, to make valid the sale of an infant's land on the petition of his guardian.

unless he be about to abuse his trust.

§ 78. **Requisites of the Order of Sale.** — The order, license, or decree to sell the real estate of minor owners must be in strict compliance with the statutory provisions on the subject, and all who deal with the guardian are bound to know the circumscribed character of his powers.⁵ A sale without the advice of a family meeting, where the statute renders such advice a prerequisite, and order of court thereon, is void, and the purchaser is in bad faith.⁶ So where the statute requires the court to specify the property to be sold, an order "to sell as much of the lands . . . as will satisfy the debts" is unauthorized, and the purchaser at a sale thereunder acquires no title.⁷ Under a statute authorizing the sale or lease of a ward's real estate, for the purpose of putting the *proceeds* on interest, or invest them in productive stocks, or in *other real estate*, it was held in Arkansas that the Probate Court had no power to order the lands of a minor to be exchanged for other lands.⁸ The exact contrary is held in Indiana, with seemingly better reason.⁹ The rules governing orders for the sale of real estate of deceased persons for the payment of debts are very much in point;¹⁰ in many instances the statutes expressly direct that the proceedings in selling the real estate of minors shall conform to those prescribed for the sale of real estate by executors and administrators.¹¹ So it is prescribed

Order must be in compliance with statute.

Power to order sale for reinvestment does not give power to order exchange.

¹ *Smith v. Race*, 27 Ill. 387, 391, affirming and adhering to *Mason v. Wait*, 4 Scam. (5 Ill.) 127, 133.

² *Prine v. Mapp*, 80 Ga. 137, 142.

³ *Orman v. Bowles*, 18 Colo. 463, 469.

⁴ *Smith v. Leavill*, 29 S. W. (Ky.) 319.

⁵ *Morris v. Goodwin*, 1 Ind. App. 481, 486.

⁶ *Lemoine v. Ducotte*, 45 La. An. 857.

⁷ *Leary v. Fletcher*, 1 Ired. L. 259, ap-

proved in *Ducket v. Skinner*, 11 Ired. L. 431. See *ante*, § 70.

⁸ *Meyer v. Rousseau*, 47 Ark. 460.

⁹ *Nesbit v. Miller*, 125 Ind. 106, 109.

¹⁰ See, as to these rules, *Woerner on Administration*, § 473.

¹¹ So, among others, in California, Florida, Georgia, Kansas (*after the order*), Michigan, Minnesota, Missouri (except that no publication is necessary), Montana, Nevada, and Wyoming.

Specify reason
of the order,
nature, time,
place, and
terms of sale.

by statute in some of the States, that the order shall specify whether the sale is ordered for the support and education of the minor, or for reinvestment of the proceeds;¹ whether at public or at private sale;² that it shall direct the time, terms, and place of sale;³ describe the real estate to be sold,⁴ and recite that the statutory requisites have been complied with.⁵ In Oregon it is held that the order need not recite the fact found that the sale is necessary or beneficial, in the words of the statute;⁶ and in Georgia, that the jurisdictional facts need not appear in the record.⁷ So, where the statute requires the statement by two witnesses of the facts and circumstances inducing them to recommend the sale, the omission to state fully such facts and circumstances forms no ground for reversing and vacating the decree.⁸ In a bill against minors for the sale of their lands to pay a mortgage entered into by their ancestor, the answer of the guardian *ad litem* confessing that they are heirs does not bind the minors; and the facts entitling the plaintiff to recover must be proved, before there can be a decree for the sale of the land;⁹ and unless it be made to appear to the Chancellor that the sale would be for the benefit of the minors, by evidence other than their own answers, he has no power to decree a sale.¹⁰

It is held, independently of specific statutory requirements, that the order of a probate court, for the sale of land of a minor by his guardian, must contain in itself a definite and certain description of the land to be sold;¹¹ and that the description contained in the order cannot be helped out by reference to documents not contained in the

Must contain
definite
description of
land to be
sold.

¹ As in Colorado: Mills' Ann. St. 1891, § 2083; Nebraska: Comp. St. 1891, ch. 23, § 53. Or show the reason for the sale, as in Montana: Comp. St. 1888, § 386; Nevada: Gen. St. 1885, § 578; Texas: Saylor Tex. Civ. St. § 2579; Wisconsin: Ann. St. 1889, § 4002.

² As in Colorado: Mills' Ann. St. § 2083; Minnesota: St. 1891, § 5788; Montana: Code Civ. Pr. 1888, § 386; Nevada: Gen. St. 1885, § 578; Texas: Saylor Civ. St. § 2579.

³ As in Colorado: Mills' Ann. St. § 2083; Idaho: Rev. St. 1887, § 5810; Ohio: Rev. St. 1890, § 6286; Texas: Saylor Texas Civ. St. § 2579.

⁴ In Minnesota: St. 1891, § 5788; Texas: Saylor Tex. Civ. St. § 2579.

⁵ In Vermont: St. 1894, § 2794, ¶ V.

⁶ Gager v. Henry, 5 Sawy. 237, 241.

⁷ Wood v. Crawford, 18 Ga. 526.

⁸ Gregory v. Lenning, 54 Md. 51, 57.

⁹ Stewart v. Duvall, 7 Gill & J. 179, 189.

¹⁰ Harris v. Harris, 6 Gill & J. 111, 114; Greenbaum v. Greenbaum, 81 Ill. 367; Smith v. Sackett, 10 Ill. 534, 546.

¹¹ Hill v. Wall, 66 Cal. 130, relying on the reasoning in Crosby v. Dowd, 61 Cal. 557, 601, which was an action in ejectment turning upon the sufficiency of the description of land contained in the complaint of a foreclosure proceeding.

order itself.¹ On the other hand, a description which is defective as a matter of pleading, may be held sufficient in an administrator's petition to sustain a sale when collaterally assailed, — a principle equally applicable to the sufficiency of the description in the order of sale of a minor's lands.² So it is held in some States, that the statutory provision requiring the order of sale to describe the property is directory only;³ and that it is not necessary to fix the precise day or hour of the sale, but only to fix certain reasonable limits for the time of the sale, of which the guardian is required to give due notice.⁴ If the court has jurisdiction, the mere fact that the guardian's petition for the sale was defective, does not affect the jurisdiction.⁵ The omission to fix the date of the sale, although required by the statute, is a mere irregularity, not affecting the jurisdiction, and not available to defeat the sale collaterally;⁶ and so of the irregularity of selling, for instance, on the 19th, instead of the 18th, as advertised.⁷ The decree of a court of chancery, having jurisdiction of the parties and of the subject-matter, for the sale of infants' land cannot be assailed collaterally, on the ground that the petition was filed by only one of the infants interested, instead of all, if all the infants were properly before the court, either as plaintiffs or defendants; or because it did not pray for an investment of the proceeds, if it alleges that the sale and reinvestment of the proceeds would be for the benefit and advantage of the infants.⁸ But where the statute authorizes an equity court to order the sale of a minor's property on the petition of his guardian only for the purpose of reinvestment, a sale, on the petition of the guardian of a life-tenant, for the purpose of obtaining means to repair the homestead on the remaining tract, the remainder-men not being made parties to the proceeding, is void.⁹ The discretion with which the court is invested in

But may be good on collateral attack though defective in a direct proceeding.

¹ *Hill v. Wall*, *supra*, McKee, J., dissenting on the ground, that the general rule based upon the maxim, "*certum est quod certum reddi potest*," according to which any description of land in a deed is sufficient, by which the land may be identified by a surveyor, or with reasonable certainty, either with or without the aid of extrinsic evidence, is applicable to such orders of sale: p. 132.

² *Wright v. Ware*, 50 Ala. 549, 558.

³ *Robertson v. Johnson*, 57 Tex. 62, 63. See also *Doe v. Jackson*, 51 Ala. 514, 517.

⁴ *Campbell v. Harmon*, 43 Ill. 18.

⁵ *McKeever v. Ball*, 71 Ind. 398, 405.

⁶ *Spring v. Kane*, 86 Ill. 580, 585; *Benefield v. Albert*, 132 Ill. 665.

⁷ *Conover v. Musgrave*, 68 Ill. 58, 59.

⁸ *Mumma v. Brinton*, 26 Atl. (Md.) 184.

⁹ *Hays v. Bradley*, 23 S. W. (Ky.) 372

granting or refusing an order of sale of real estate belonging to wards, when necessary for their education and support, is not absolute, and when improperly exercised, will be controlled by an appellate court.¹

The decree should not authorize the sale of more property than may be necessary for the purpose intended to be accomplished by it. If the sale be applied for on the ground that it is necessary for the payment of the ward's debts, the court cannot order all of his property to be sold, if the sale of a portion thereof would be sufficient.²

The costs of a proceeding to obtain an order of sale of the real estate of a minor are, as expressed by statute in some of the States, to be adjudged in favor of the party prevailing;³ or to either party.⁴ In Virginia the court may order the sale, or sanction a previous sale, of so much of a ward's personalty as may be necessary to pay proper expenditures beyond income; and a chancery court may order the sale of the ward's realty, when necessary for his maintenance and education, or other interests; but if, when the court is called on to confirm a sale of real estate, the necessity by reason of which it was ordered no longer exists, the sale should not be confirmed, although there is no personalty with which to pay the costs of the proceeding.⁵

It results from the statutory provisions of most States, that the order, decree, or license to sell the real estate of minors can be made by the court only when in session as such, or, as is usually said, in term time; in other words, that no such order can be made by the judge in vacation. And such seems necessarily to be the law without affirmative or express statutory enactment on the subject. But in Nebraska it has been held that the judge of the District Court (which court in Nebraska possessed jurisdiction to order the sale of minors' real estate) has power to make such order at chambers, during the vacation of the court.⁶ A similar conclusion seems to have been reached in Georgia, where an order to sell real

Order must be made in term

unless authorized by statute to be at chambers.

¹ Dickinson v. Hughes, 37 Iowa, 160.
² Succession of Dumestre, 40 La. An. 571.
³ So, *inter alia*, in California: Code Civ. Proc. § 1786; Kansas: Gen. St. 1889, § 3232; Nevada: Gen. St. 1885, § 577; Tennessee: Code, 1884, § 4066.

⁴ As in Nebraska: St. 1891, ch. 23, § 62; Wyoming: Rev. St. 1887, § 2264.

⁵ Harkrader v. Bonham, 88 Va. 247.

⁶ Stewart v. Daggy, 13 Neb. 290; Spring v. Kane, 86 Ill. 580, 586.

estate may be made in vacation by the Superior Court, all parties in interest consenting.¹

In the absence of statute authority to sell at private sale, the sale should be public and after due advertisement, in the manner of judicial sales generally.²

¹ *Southern Marble Co. v. Stegall*, 15 S. E. (Ga.) 806.

² *Lenders v. Thomas*, 35 Fla. 518, 520.

CHAPTER X.

OF EXECUTING THE ORDER OF SALE.

§ 79. **Time of selling.** — According to the statutory provisions of some of the States, the order, decree, or license to sell the real estate of minors must be executed within a certain time fixed by the statute, and a sale beyond the time so fixed is void. Thus, for instance, in California,¹ Idaho,² Massachusetts,³ Michigan,⁴ Montana,⁵ Nebraska,⁶ Nevada,⁷ Oregon,⁸ Wisconsin,⁹ and perhaps other States, the period is limited to one year, and in New Hampshire,¹⁰ Vermont,¹¹ and probably elsewhere, to two years.

In some of the States, the rule thus laid down for executors and administrators has been strictly and literally enforced. Thus, it was held in Massachusetts, that a sale completed within the year in all respects except the delivery of the deed to the purchaser, passes no title if the deed is not delivered until after a year from the date of the license ;¹² but under a statute enacted to cure the defect in such sales it was held, that if the sale was made within the year, although the deed was not made until afterward, the sale was valid, notwithstanding the misdescription of the executrix, by styling herself administratrix.¹³ And in Maine it was subsequently held that since the acknowledgment and recording are not essential to the validity of a deed, if executed and delivered within the year, although not acknowledged until afterward, it was sufficient and the sale valid.¹⁴

¹ Code Civ. Pr. 1885, § 1790.

² Rev. St. 1887, § 5810.

³ *Richmond v. Gray*, 3 Allen, 25.

⁴ How. Ann. St. 1882, § 6095.

⁵ Comp. St. 1888, p. 370, § 389.

⁶ Comp. St. 1891, ch. 23, § 57.

⁷ Gen. St. 1885, § 581.

⁸ Codes and Gen. L. 1887, § 3125.

⁹ But may be renewed within two years: Ann. St. 1889, § 4002.

¹⁰ Publ. St. 1891, ch. 177, § 11.

¹¹ St. 1894, § 2795.

¹² *Macy v. Raymond*, 9 Pickering, 285. See also *Marr v. Boothby*, 19 Me. 150; *Mason v. Ham*, 36 Me. 573, 576.

¹³ *Cooper v. Robinson*, 2 Cush. 184; *Jewett v. Jewett*, 10 Gray, 31, 33.

¹⁴ *Poor v. Larrabee*, 58 Me. 543, 558.

Although there be no statutory limitation to the duration of the license, yet a sale made after an unreasonable delay in carrying out the order will for that reason be void.¹ It has already been mentioned² that as a rule no sale of real estate of a minor can be authorized or made after cessation of the guardianship, nor after cessation of the authority of the court, nor after repeal of the law under which the sale was ordered. But where the order to sell is general, without restriction as to time, a clause requiring a report at the next term does not limit the exercise of the power within that time;³ and an order entered at the succeeding term, extending the time for making sale to the next term thereafter, in no way changes the original order, so that a sale made several years after such original order is valid.⁴ The removal of an executor was held not sufficient ground to dismiss proceedings commenced by him, but that it was the duty of the successor to proceed.⁵ So a sale of a minor's land by a guardian who is a married woman, though a *feme sole* when appointed, made upon a proper application, is valid against collateral attack after confirmation, in the absence of a statute revoking the authority of a *feme sole* guardian by her marriage.⁶

It is self-evident, that if the order of sale fix the date thereof, it must take place on the day so named.⁷ But it is in some instances provided, that the court may direct a postponement of the sale from the day so fixed, and direct further notice to be given, as in Iowa⁸ and Kansas;⁹ or that the guardian may himself adjourn the sale from time to time, not exceeding three months in all, as in Minnesota¹⁰ and Wisconsin¹¹ or from day to day without such limitation, as in Texas.¹² And where the statute authorizes a post-

Must be within a reasonable time, though no time is fixed.

Postponement of sale by order of court,

or by the guardian.

¹ Wellman v. Lawrence, 15 Mass. 326. There was an interval, in this case, of twelve years between the date of the order and the sale, and the conditions under which the order was obtained had materially changed.

² Ante, § 72.

³ Robert v. Casey, 25 Mo. 584, 591.

⁴ Bowen v. Bond, 80 Ill. 351, 357.

⁵ Steele v. Steele, 89 Ill. 51, 53.

⁶ Alexander v. Hardin, 54 Ark. 480, 483.

⁷ A sale made on a day not named by the court is a nullity unless confirmed by

the court, and if confirmed by the court, may be set aside in a direct proceeding. Brown v. Christie, 27 Tex. 73.

⁸ McClain's Ann. Code, § 3450.

⁹ Gen. St. 1889, § 3229.

¹⁰ Gen. St. 1891, § 5802.

¹¹ Ann. St. 1889, § 4007. Notice must be given at the time and place originally fixed for sale; and if the postponement be for more than one day, such notice must be given by posting, or publication, or both.

¹² Sayl. Civ. St. § 2584.

ponement by the guardian for a period not exceeding one week, as is held to be the case in Oregon,¹ a postponement for four weeks is held not to be so irregular as to render the sale thereafter void.²

It is, in the absence of statutory authority in the guardian to change the time or place of the sale as originally designated, the safer course to report to the court having made the original order the result of an unsuccessful attempt to sell, and obtain instructions as to the future course, and a new sale, if a better result may be expected at a different time or place.³

§ 80. **Appraisement before the Sale.** — Among the provisions designed for the protection of the interest of minors against sacrifice of their real estate, is the requirement of an appraisement of the property to be sold, usually by three disinterested householders, appointed in some instances by the guardian, in others by the court. The necessity, purpose, and principles of such appraisements, in connection with the procedure in selling the real estate of deceased persons, are discussed elsewhere,⁴ and are very much in point in the sale of the property of minors. It is important that the appraisers should bear in mind the function which their report performs, which is to inform the court of the value — usually described as the *true* value — of the property in question for the purposes of the sale. To this end it is not sufficient that the appraisers should ascertain the cost of the property, or even its exact *intrinsic* value, for there may be circumstances making it improbable that either the cost or the intrinsic value is obtainable at a sale ordered by the court; but they should ascertain its *exchangeable* value, or the price which, in their judgment it will bring at the sale contemplated.⁵ In the case of sales by executors and administrators, ordered by probate courts for the payment of the debts of the decedent, the sale is compulsory; hence, the object of the appraisement is to find the probable result of a forced sale. Such may be the case, also, in the sale of a minor's property ordered to be sold for the payment of his debts, or for his maintenance

Real estate
must be ap-
praised before
the sale

at its ex-
changeable or
market value.

At forced sale,
if sale is com-
pulsory.

¹ Gager v. Henry, 5 Sawy. 237, 247.

² Gager v. Henry, *supra*, 248.

³ Talley v. Starke, 6 Gratt. 339, 348.

⁴ Woerner on Adm. §§ 320, 476.

⁵ "The courts generally regard, as the value of a thing, the price it will bring." Per Green, P., in Bradford v. McConihay, 15 W. Va. 732, 763.

and education. But where the property is sold for reinvestment, it is important that the court be informed of the *actual* value, that is, its *intrinsic* value to the infant owner, so that it may be apparent whether the proposed conversion of the property be for the minor's benefit or advantage.¹ Hence, the court, in approving or disapproving such a sale, should ascertain the theory on which the appraisement was made.

The appraisement has reference to each particular piece of the real estate sold; hence, if the statute inhibits the sale of a minor's property at less than its appraised value, the sale of one piece of property at less than its appraisement is void, although the property in the aggregate brought more than the aggregate of the appraisement.² But a general statute directing that before any land is sold under the order or judgment of a court, it shall be valued, and if it does not sell for two thirds of such valuation, the defendant or his representatives may redeem it, is held not to apply to sales ordered on the petition of a guardian.³

Each tract to be sold separately.

The sufficiency of an appraisement to give the information to the court to enable it to exercise its judgment in confirming or rejecting the sale, is not open to be controverted upon a collateral attack;⁴ and where it is apparent that the appraisement was substantially filed before the confirmation of the sale, the marking it "filed" by the clerk is not essential to its validity.⁵ And so it has been held, that the failure of the appraisers to sign the appraisement is a defect which does not avoid the sale as against purchasers in good faith.⁶ But the failure to have an appraisement made before the sale may be urged to avoid it;⁷ and a deed made by a curator conveying land of his ward, which fails to recite the order of court, appraisement, time, place, and terms of sale, &c., is for that reason defective, but not necessarily void.⁸ So it is held that a sale is not void merely because the appraisement was made subsequent to the contract of sale, if made with the understand-

Appraisement not assailable collaterally.

¹ The statute of Louisiana inhibits the sale of property of minors, *unless sold for the payment of debts of the succession, at less than the amount of the appraisement*: *Fraser v. Zylicz*, 29 La. An. 534.

² *Frazer v. Zylicz*, *supra*.

³ *Woolridge v. Jacobs*, 79 Ky. 250.

⁴ *Smith v. Biscailuz*, 83 Cal. 344, 359.

⁵ *Smith v. Biscailuz*, *supra*.

⁶ *Worthington v. Dunkin*, 41 Ind. 515, 522.

⁷ *Strouse v. Drennan*, 41 Mo. 289, 296.

⁸ *Bobb v. Barnum*, 59 Mo. 394, 398.

ing that it cannot be finally consummated till further proceedings are had.¹ Where the statute requires the appraisers to report the *net* value of the real and personal estate of the minor, and they reported in general terms only the gross value, a sale ordered on the basis of such report was held invalid.² The term "householders" does not necessarily mean "freeholders;" but where the appraisers describe themselves as "householders" in their certificate of appraisement, parol evidence may be received that at the time of the appraisement they owned real estate in the county; and one in possession of land claiming to own it, and reputed to own it in fee, is a freeholder within the meaning of a statute requiring a freeholder qualification in an appraiser, independently of any question as to the validity or record sufficiency of his title.³

§ 81. **Notice of the Sale.** — In order to bring about competition among persons desiring to purchase, to secure the highest price for the land to be sold, it is provided by statute in the several States, that public notice be given of the property offered for sale, together with the time, place, and terms of the sale; usually by posting such notices at a number of the most public places in the county, town, or neighborhood, or by publishing them in a newspaper for a stated time before the day of sale, or by both these methods of publication.⁴ Publication in a foreign language is insufficient;⁵ and so is publication in the English language in a paper published in a foreign tongue.⁶ Where the statute requires the sale to be upon such notice, the sale, as against the ward, is void, unless it appear that the notice was given;⁷ but if substantial notice was given, a departure from the technical requirements as to the method of publication has been held not to invalidate the title of a *bona fide* purchaser;⁸ and the want of

Public notice
of the sale
must be given.

Substantial notice sufficient
in collateral
attack.

¹ *Ib.* p. 398.

² *Woodcock v. Bowman*, 4 Metc. (Ky.) 40.

³ *Exendine v. Morris*, 8 Mo. App. 383, 387.

⁴ See *Woerner on American Administration*, § 475.

⁵ *Doerge v. Heimenz*, 1 Mo. App. 238.

⁶ *Heitkamp v. Biedenstein*, 3 Mo. App. 450, 452; *Graham v. King*, 50 Mo. 22.

⁷ *Hobart v. Upton*, 2 Sawy. 302.

⁸ On the ground that the acts of the guardian are in legal contemplation the acts of the ward, and it cannot be permitted to the ward to come in and allege the non-feasance of his guardian, to disturb a title derived from him through his legally constituted representative. The provisions touching the mode of advertising the notice are held to be directory; and if the ward is prejudiced by any neglect on the part of the guardian in the

notice of the sale, though irregular and erroneous, is not jurisdictional, and affords the purchaser no ground for refusing to complete the purchase.¹ Publication in the English language, in a paper mainly published in the German language, is held improper, but does not of itself vitiate a good-faith sale legally made in other respects, when attacked collaterally.² So where the statute requires posting "in three of the most public places in the township," proof of the posting, specifying the places where posted, but not stating that they were the *most* public places, is held sufficient, if accepted by the trial court, and the question cannot be raised for the first time in action of ejectment.³ A statute requiring publication "for four weeks successively" is complied with by a publication for four weeks successively prior to the sale; it is not necessary that the publication should be during the four weeks next preceding the sale;⁴ and so publication for a longer period than that required by the statute does not affect the validity of the sale.⁵ But if the requirement is a publication for a certain time "*next* before such sale," the publication for such time "*previous*" to the day appointed for the sale is insufficient.⁶ An order requiring publication of a notice once a week for three successive weeks was held to be complied with if it was published in each daily issue of a newspaper for the full period of twenty days,⁷ and so a statute requiring publication "for six weeks successively next before the day of sale" was held complied with by publication beginning more than six weeks before the day of sale, although there was an interval of more than one, but less than two, weeks between the last publication and the day of sale;⁸ but a publication beginning on the 24th day of November, for

execution of the trust, his remedy is upon the guardian's bond: *Palmer v. Oakley*, 2 Doug. 433, 495.

¹ *Beidler v. Friedell*, 44 Ark. 411, 414.

² *Schaale v. Wasey*, 70 Mich. 414, 418.

³ *Dexter v. Cranston*, 41 Mich. 448.

⁴ *Walker v. Goldsmith*, 14 Oreg. 125, 145.

⁵ Hence, if the court have power to order notice to be given for ten days, or for thirty days, and publication was for thirty days, it is immaterial whether the order was made to publish for ten, or for thirty days: *Morton v. Carroll*, 68 Miss. 699, 702.

⁶ *Montour v. Purdy*, 11 Minn. 384, 402.

⁷ *Orman v. Bowles*, 18 Colo. 463, 471. So where there was an order to publish for three successive weeks, once a week, the publication, on the 7th, 14th, and 21st day of April, of a notice of sale on "Thursday, the 22d day of said April," was held not so defective as to vacate the sale in a collateral proceeding: *Brigham v. B. & A. R. R. Co.*, 102 Mass. 14, 17.

⁸ A sale ordered for the fourth of March and advertised on the twelfth of January, and then each week to and including February 23d, was held good: *Dexter v. Cranston*, 41 Mich. 448, 451.

a sale on the 26th day of December, is not sufficient under a statute requiring a publication for six weeks.¹ Nor is publication beginning on the 27th of February for a sale on the 14th of March, in compliance with a statute requiring publication for three weeks.²

The notice should state the time, place, and terms of sale. But where no objection is made to the validity of the notice in reference to the statement of time and place, the statement that the terms would be made known at the time and place of sale does not make the notice void, or leave the court without jurisdiction to approve the

sale.³ So there should be a description of the property to be sold; but if the notice, published in the county where the land lies, correctly describe the

government subdivision, the omission to name the county and State does not avoid the sale for uncertainty.⁴ An error in reciting the date of the order of sale, if it does not mislead, does not vitiate the notice or avoid the sale;⁵ and so an error in the published signature of a non-resident guardian's attorney in fact is a mere informality, not sufficient to avoid the sale, if the guardian's name was authoritatively and correctly also attached thereto.⁶ The requirement of publication in a newspaper "printed" in the county where the land lies, is complied with by publication in a paper "published and circulating in the county."⁷

A statute providing what is sufficient proof of posting notices of sale does not thereby exclude other methods of proof;⁸ and where the proof of the posting of notices is sufficient in form, but the jurat bears date prior to that on which the notices were posted as shown by the affidavit, the misdate will be deemed a clerical error, and the affidavit intended to have been made on a day subsequent to the posting, if the return of sale by the guardian recites the posting and publication as the law requires.⁹ But if the statute requires the notices to be

¹ Schlee v. Darrow, 65 Mich. 362, 371.

² McCrabb v. Bray, 36 Wis. 333, 339.

³ Richardson v. Farwell, 49 Minn. 210, 218.

⁴ Richardson v. Farwell, 49 Minn. 210, 219.

⁵ Richardson v. Farwell, 49 Minn. 210, 218.

⁶ Richardson v. Farwell, 49 Minn. 210

219.

⁷ Dexter v. Cranston, 41 Mich. 448, 452.

⁸ Larimer v. Wallace, 36 Neb. 444, 455.

⁹ Walker v. Goldsmith, 14 Oreg. 125, 143.

posted in the ward in which the property is situated, a sale is irregular, if the proof does not show the posting in such ward.¹ Under a statute requiring affidavit of publication to be made by "the foreman or the printer of the newspaper," it was held that an objection, that it purports to be made by an affiant describing himself as foreman of the paper, naming it, is more nice than wise.² And where, in consequence of the destruction of newspaper files and an apparent error in the affidavit of publication, parol evidence of the publication became necessary, the judgment will not be disturbed on appeal, if there was evidence tending to support the finding.³ The affidavit of one describing himself as "the book-keeper" of the newspaper is not in compliance with a statute requiring affidavit of the publication to be made by "the printer of the newspaper, or of his foreman, or principal clerk;" but such mode of proof is not exclusive of other modes of proof allowed by another applicable statute.⁴ It is irregular, after giving notice that the sale will be made on the premises, to sell at another place, and purchasers ought not to be compelled to perfect their contracts of purchase in such case.⁵

No notice of the time and place of sale under an order to sell at private sale is necessary, unless required by a statute.⁶

Unless required by statute, no notice is necessary for a private sale.

A guardian's sale, void on account of a defective notice, may be confirmed in equity under a statute to that effect, passed after such sale.⁷

As to the adjournment or postponement of a sale on the day for which notice has been given, see *ante*, § 79.

§ 82. **The Agreement between the Parties to the Sale.** — That guardians have no power to sell the real estate of their wards without the license or order of the court possessing jurisdiction to that end, or, perhaps, express authority from the legislature,⁸ has already been pointed out.⁹ It is, therefore, *ultra vires* for

¹ Schlee v. Darrow, 65 Mich. 362, 371.

² Dexter v. Cranston, 41 Mich. 448, 453.

³ Richardson v. Farwell, 49 Minn. 210, 219.

⁴ Schlee v. Darrow, 65 Mich. 362, 371.

⁵ Talley v. Starke, 6 Gratt. 339, 348.

⁶ Maxwell v. Campbell, 45 Ind. 360, 362; McVey v. McVey, 51 Mo. 406, 420.

⁷ Nott v. Sampson, 142 Mass. 479.

⁸ Mason v. Wait, 4 Scam. 127, 133.

See, as to the power to sell under special statutes, *ante*, § 69.

⁹ *Ante*, § 54; §§ 68 *et seq.* See also Washabaugh v. Hall, 56 Northw. R. 82; Kirkman, *ex parte*, 3 Head, 517, 519; Wells v. Chaffin, 60 Ga. 677, 678; Shaffer v. Peerless, 18 Kans. 24, 32; Doty v. Hubbard, 55 Vt. 278; Antonidas v. Walling, 4 N. J. Eq. 42; Jackson v. Todd, 25

a guardian to attempt to bind the title and interest to and in his ward's land by a contract of his own,¹ and it is against public

Courts will not give effect to private agreement for sale of a ward's land.

policy to give effect to a private agreement with a guardian for the purchase of his ward's land at a stipulated price, at a future sale under order of the court.²

So it is held that the assignment, by a guardian, of his ward's land-warrant without authority from the proper court, does not transfer the minor's right in the warrant to the purchaser.³ A deed of gift, however, conveying real estate to minors with the proviso "that it shall be lawful for the legal guardian of said parties . . . to sell and dispose of said lots . . . whenever, in the discretion of such guardian, the same shall be necessary for the support, maintenance, and education of the parties," was held to confer upon such guardian authority to sell said real estate at private sale, without any order from the court, or to exchange the same for other lands.⁴

And so it is held that a Chancellor, being satisfied that the interests of minors manifestly require a sale of their real estate, may, instead of ordering such sale by decree, confirm a sale already made by the guardian.⁵ In Louisiana the advice and consent of a family meeting is necessary to the validity of a tutor's sale of real estate of his pupil, besides the order of court.⁶

Under a statute declaring that a guardian's sale shall not be avoided on account of any irregularity in the proceedings if it

Private sale void, if public sale was ordered.

appear (among other things) "that the premises were sold . . . at public auction," it was held that as against the ward or those claiming under him a sale

N. J. L. 121, 124; *House v. Brent*, 69 Tex. 27; *Weld v. Johnson Mfg. Co.*, 57 N. W. (Wis.) 374; *Moore v. Hood*, 9 Rich. Eq. 311; *Worth v. Curtis*, 15 Me. 228.

¹ *Morrison v. Kinstra*, 55 Miss. 71, 77; *Gaylord v. Stebbins*, 4 Kans. 42, 48; *Thacker v. Henderson*, 63 Barb. 271, 280.

² *Downing v. Peabody*, 56 Ga. 40, approved in *Rome Land Co. v. Eastman*, 80 Ga. 683, 691. But the statute may authorize the court, if for the best interest of the ward, to direct the guardian to accept an offer previously made, and sell on such terms as may seem best.

³ Under a statute authorizing the guar-

dian of the minor "upon being duly authorized by the orphans' or other court having probate jurisdiction," to sell: *Mack v. Brammer*, 28 Oh. St. 508, 514.

⁴ *Thurmond v. Faith*, 69 Ga. 832, 838. It will be noticed that the validity of the sale was maintained on the ground of the execution of a power given by will, not by authority of the guardian as such.

⁵ *Garland v. Loving*, 1 Rand. 396, 402; *Hurt v. Long*, 6 Pickle, 445, 457.

⁶ *Succession of Weber*, 16 La. An. 420; *Wisenor v. Lindsey*, 33 La. An. 1211; *Lemoine v. Ducote*, 45 La. An. 857.

made otherwise than at public auction is invalid, and does not affect the title of the ward.¹ For the same reason, an agreement between parties not to bid against each other at a public sale is held a fraud upon the law and against public policy, and would avoid a sale even at law, so that a deed executed in consequence of it would convey no title.²

But in many States the statutes expressly authorize probate courts to order the sale of minors' land at public or at private sale, or at either public or private sale in the alternative;³ and even without express authorization thereto the power to order sales to be made at private sale is deduced from statutes granting the power to order such sales without restriction, whether it is to be private or public.⁴ In conducting a private sale the utmost fairness is required from the guardian, as in all dealings between him and his ward, and if he sells for less than a fair price, it is at his peril; the receiving and recording the guardian's return of the sale by the Probate Court does not conclude the parties in interest from investigating the guardian's conduct and holding him liable.⁵

Court may order sale to be private,

either public or private.

Without the sanction of a court of competent jurisdiction or act of the legislature, a guardian is not authorized to accept payment otherwise than in cash for the ward's portion of the purchase money;⁶ and *a fortiori*, if the decree of the court direct the title to be retained until the payment of the purchase money, the purchaser takes subject to the payment of the purchase money, where, instead of cash, a guardian note was given in payment; and the purchasers from him take with notice of the power of the court over the titles acquired by them.⁷ And so where the guardian receives his own individual notes in payment of his ward's real estate, the purchaser may be held accountable for the trust property, or its proceeds if sold by him to an innocent purchaser.⁸

Sale must be for cash.

¹ Hobart v. Upton, 2 Sawy. 302.
² Breese, J., in Loyd v. Malone, 23 Ill. 43, 48, citing authorities on the general principle.

³ *Ex parte* Consins, 5 Me. 240.
⁴ Fleming v. Johnson, 26 Ark. 421, 422; McVey v. McVey, 51 Mo. 406, 418; Pattee v. Thomas, 58 Mo. 163, 172; Jackson v. Irwin, 10 Wend. 441, 446; Gilmore

v. Rodgers, 41 Pa. St. 120, 128; and see, as to sales by decree of courts of equity, Rowland v. Thompson, 73 N. C. 504, 514.

⁵ Holbrook v. Brooks, 33 Conn. 347.

⁶ Brenham v. Davidson, 51 Cal. 352, 356.

⁷ Lord v. Merony, 79 N. C. 14, 16.

⁸ Wallace v. Brown, 41 Ind. 486. See also Bevis v. Heflin, 63 Ind. 129, 134.

At a sale by order of a chancery court, the guardian should enter into a written contract with the purchaser, subject to the ratification of the court, specifying therein the terms and conditions of the sale, and the manner in which the purchase money is to be secured, and the time of payment; and such written contract should be signed by the guardian and the purchaser.¹

Sale under order of Chancellor to be in writing.

It is enacted by statute in many States, that sales of real estate of minors shall be conducted in the same manner, and the same proceedings shall be had with reference thereto, as in cases of sale of real estate of deceased persons for payment of debts. In such States the principles governing sales by executors or administrators are applicable also to sales by guardians. Guardians must, for instance, act within the scope of their powers under the statute and the directions in the order of sale, and are personally liable for any deviations therefrom; they cannot change or vary the terms and conditions of the order of sale; they cannot bind their wards by any statements or representations except such as are prescribed, or are within the discretion vested in him.² The purchaser has no right to infer, from the guardian's assurance that he will give a good title, that he is acquiring a title in fee simple; and such assurance being given in good faith and without fraudulent intent, the purchaser is not entitled to equitable relief, although he was misled by the statement.³

Rules governing executors and administrators applicable to guardians.

Where the court orders a sale to be made, and that no bid be received for less than a sum stated, the price of the property is not thereby fixed, nor the sale confirmed in advance, on the payment of such price or more.⁴ A sale in violation of an order of court is void, though in the absence of any order on the subject the guardian would have had authority to make such disposition.⁵

Sale in violation of order of court void.

A guardian who acts as auctioneer in selling land of his ward under a license of court, is not authorized as such to sign for the purchaser a memorandum in writing to take the sale out of the

¹ *In re Hazard*, 9 Paige, 365.

³ *Findley v. Richardson*, 46 Iowa, 103,

² *Woerner on Administration*, § 477, 104.

p. 1055; and as to the power to bind the ward by his representations, see *ib.* p. 1057. As to the covenants in the deed of conveyance, see *post*, § 85.

⁴ *In re Dickerson*, 111 N. C. 108.

⁵ *Cox v. Manvel*, 57 N. W. (Minn.)

1062.

statute of frauds.¹ It has been held that a guardian cannot, even with the consent of the court, contract with an attorney to share with him land in litigation, belonging to the ward, for his legal services in recovering the same.²

§ 83. **Report of the Sale.**—In most of the States it is made the duty of guardians to report to the court what steps they have taken in and about the sale of their wards' real estate, and what agreement of sale has been reached.³ The time for making such report is fixed in some States to be as soon as possible after the agreement to sell; in others, at the next term of the court thereafter. In Indiana, where the statute required the guardian to bring into court the proceeds of the sale, notes, &c., together with the report, it was held that the production of the proceeds does not discharge the guardian's liability therefor, because he is required to pay the same according to law, which means payment to the ward, or some person entitled to receive the same; and neither the judge of the court, nor the clerk, is the proper custodian of the fund.⁴ Where the statute requires report to be made to the next term after the sale, it was held, in Missouri, that such report made to the court at the same term during which the sale was made, was premature, and gave no jurisdiction to the court to approve the sale.⁵ This rule applied only to probate courts; report of sale to the Circuit Court during the same term may be erroneous, but does not avoid the judgment of approval, so that, if not appealed from, the sale cannot be collaterally attacked.⁶ But a report made prematurely, the approval of which is therefore held a nullity, remains in abeyance, and may be approved, if otherwise regular, several years thereafter;⁷ and a delay to report, arising not out of any defect or bad faith in the action of the guardian, but from his mistake as to the duty to report, was held not to pre-

Sale to be reported to the court.

Report made previous to time fixed by statute held to avoid the sale,

unless subsequently approved.

¹ Bent v. Cobb, 9 Gray, 397.

² Glasgow v. McKinnon, 79 Tex. 116.

³ Maxwell v. Campbell, 45 Ind. 360, 362; Musgrave v. Conover, 85 Ill. 374; Mulford v. Beveridge, 78 Ill. 455, 458. But the report, although made on the oath of the guardian, is not conclusive on the ward or guardian; the court must, if necessary, require proof, examine witnesses, and resort to all means necessary

to ascertain the truth, and allow or reject the report: *In re Steele*, 65 Ill. 322, 326.

⁴ State v. Steele, 21 Ind. 207, 209; State v. Fleming, 46 Ind. 206.

⁵ State v. Towl, 48 Mo. 148, 150; Strouse v. Drennan, 41 Mo. 289.

⁶ Castleman v. Relfe, 50 Mo. 583, 588.

⁷ McVey v. McVey, 51 Mo. 406, 424; Price v. Springfield R. E. Agency, 101 Mo. 107, 117.

vent a confirmation after the lapse of nineteen years.¹ The report, though not acted on for seven or eight years after the sale, forms part of the original case, and on the hearing thereof any objection may be urged that could have been heard if acted on at the proper term.² And in later cases, the doctrine that a sale reported prematurely is void, has been overruled; such sales are now held as valid as if the approval had been in the Circuit Court.³

The sale is not completed until it is reported to and confirmed by the court.⁴ Under a statute authorizing the clerk to keep open court and transact, in the absence of the judge, all probate business not requiring notice, subject to the supervision and approval of the judge, the clerk is authorized, in the absence of the judge, to approve the sale and deed made by the guardian; and if, in such case, the judge afterward approve the *report* of sale, such approval includes the approval of the sale and deed by the judge.⁵

Sale is not complete without approval.

In Iowa, clerk may approve or reject.

Trustees appointed by the decree of a court of equity to sell real estate are agents of the court; their report is made under the sanction of an oath, and entitled to full faith and credit, unless contradicted by conclusive testimony constituting preponderating evidence sufficient to set aside the report.⁶

The omission by the guardian to sign the report of sale has been held not to invalidate the sale; the defect may be supplied by amendment under order of the Probate Court.⁷

§ 84. **Approval or Rejection of the Sale.** — Sales of real estate of minors are not valid to pass the title, as a general rule, until they have been reported to and confirmed by the court.⁸ A sale by a guardian, though properly authorized, does not convey even an equitable title to the purchaser, if not confirmed by the court.⁹ Until

No title passes before approval of the sale by the court.

¹ Harvey, *in re*, 16 Ill. 127, 131.

² Spellman v. Dowse, 79 Ill. 66, 68.

³ Henry v. McKerlie, 78 Mo. 416, 429.

⁴ Gwynn v. McCauley, 32 Ark. 97, 106; Young v. Keogh, 11 Ill. 642; Rawlings v. Bailey, 15 Ill. 178; Greer v. Anderson, 35 S. W. (Ark.) 215.

⁵ Bunce v. Bunce, 59 Iowa, 533, 538.

⁶ Bolgiano v. Cooke, 19 Md. 375, 397.

⁷ Ellsworth v. Hall, 48 Mich. 407, 410.

⁸ Gwynn v. McCauley, 32 Ark. 97, 106; Reid v. Hart, 45 Ark. 41, 49; People v.

Circuit Judge, 19 Mich. 296, 298; Titman v. Riker, 43 N. J. Eq. 122; Harrison v. Ilgner, 74 Tex. 86, 88; *In re* Dickerson, 111 N. C. 108, 113; White v. Clawson, 79 Ind. 188, 191; Wade v. Carpenter, 4 Iowa, 361, 366; Reid v. Morton, 119 Ill. 118, 132; Swenson v. Seale, 28 S. W. (Tex. Civ. App.) 143; Lumpkins v. Johnson, 32 S. W. (Ark.) 65.

⁹ Bone v. Tyrrell, 113 Mo. 175, 184; Henry v. McKerlie, 78 Mo. 416, 428.

the confirmation of the guardian's sale, under the order of a court of chancery, the guardian has no legal authority to receive the purchase money; and if he does so, he holds it merely as the depository of the purchaser.¹ The guardian has no right to give a deed to the ward's property sold by him until the sale has been confirmed; but if he does so, and the sale is thereafter confirmed, the deed is good.² So there may be a confirmation, subsequent to the deed, *nunc pro tunc*, at the purchaser's instance.³ Before the ratification of a sale made by the order of a court of chancery, all objections on equitable principles are open for consideration; and the sale will be set aside on proof of error, mistake, misunderstanding, or misrepresentation as to the terms or manner of sale; it must appear to be in all respects fair and proper, or it cannot receive the sanction of the court;⁴ the court will not approve a sale if injustice is thereby inflicted upon a party not in default,⁵ or if it appear that the court had no jurisdiction to order the sale.⁶

Purchase money before approval of sale is held by the guardian as a depository;

but subsequent confirmation makes deed good.

Before ratification of sale in chancery, objections on equitable grounds will be heard.

The approval or confirmation by the court need not necessarily appear by a formal entry of record; it is sufficient if the approval appear from the clerk's minutes,⁷ or if it can be gathered from the whole record;⁸ but without such formal order the conveyance is not *prima facie* evidence, under the statute of Texas, that the requirements of the statute have been complied with.⁹ A deed made by a commissioner appointed by the Probate Court to sell a minor's property is *prima facie* proof that such sale was reported to and approved by the court.¹⁰ Approval of the report is approval of the sale.¹¹ So where the clerk, being thereto empowered by statute, approve a sale, the subsequent approval of the report will constitute an approval of the sale by the court.¹² But the allowance by the court of a guardian's account, in which he charges himself with

Confirmation may be inferred from the whole record.

¹ State v. Cox, 62 Miss. 786, 790.

² Hammann v. Mink, 99 Ind. 279, 286.

To same effect: Alexander v. Hardin, 54 Ark. 480, 482.

³ Reid v. Morton, 119 Ill. 118, 133.

⁴ Bolgiano v. Cooke, 19 Md. 375, 392.

⁵ Bolgiano v. Cooke, *supra*.

⁶ Spellmann v. Dowse, 79 Ill. 66.

⁷ Moore v. Davis, 85 Mo. 464.

⁸ Henry v. McKerlie, 78 Mo. 416, 430; Gilbert v. Cooksey, 69 Mo. 42.

⁹ Robertson v. Johnson, 57 Tex. 62.

¹⁰ Edwards v. Powell, 74 Ind. 294, 296.

¹¹ Exendine v. Morris, 8 Mo. App. 383.

¹² Bunce v. Bunce, 59 Iowa, 533.

the proceeds of a sale of his ward's land made in violation of the court's order, does not constitute an approval of the sale, the court not knowing that he had disobeyed its orders.¹

Confirmation of the sale by the court cures defects and irregularities,² such, for instance, as failing to sell in the order indicated by the license,³ making the deed before con-

Confirmation
cures defects,

creates pre-
sumption that
orders of court
have been
complied with.

firmation,⁴ selling at a time and place different from that prescribed by the law,⁵ or on insufficient publication of notice,⁶ the confirmation creates a presumption that the guardian complied with the orders of the court, and that all orders necessary to give validity to the sale had been made;⁷ and such presumption is conclusive where the record does not show affirmatively that jurisdiction did not attach.⁸ But where the statute conditions the validity of a sale on the literal compliance with its provisions, the confirmation does not validate a sale made in disregard of such provisions;⁹ and in Minnesota, it adjudicates only as to those matters which the statute requires the court to find, for instance, that the sale was legally made and fairly conducted, and that the sum bid was not disproportioned to the value, or that a greater sum cannot be obtained; it passes on nothing else, and is not proof of any prior proceeding,¹⁰ or that the person who executed the conveyance was the guardian.¹¹

The confirmation does not, of its own force, complete or constitute the sale, nor divest the ward of his title in the property reported as sold. The title passes on delivery of the deed.¹² But a confirmed guardian's sale, under which the purchase price was paid and possession delivered, but no deed executed, conveys an equitable title, and a right to

Title passes on
delivery of
deed.

¹ Cox v. Manvel, 57 N. W. (Minn.) 1062.

² Daniel v. Leitch, 13 Gratt. 195, 212.

³ Emery v. Vroman, 19 Wis. 689, 700.

⁴ Hammann v. Mink, 99 Ind. 279, 286.

⁵ Brown v. Christie, 27 Tex. 73, 77 (holding that if the confirmation is improper, the judgment may be corrected in a direct proceeding, but it is not open to collateral inquiry).

⁶ Doe v. Jackson, 51 Ala. 514, 517.

⁷ Maxsom v. Sawyer, 12 Ohio, 195, 206; Calloway v. Nichols, 47 Tex. 327, 331;

a fortiori, if so declared in the order of confirmation: Richardson v. Butler, 82 Cal. 174, 180.

⁸ Butler v. Stephens, 77 Tex. 599, 603.

⁹ Blackman v. Baumann, 22 Wis. 611, 612; Weld v. Johnson Mfg. Co., 84 Wis. 537, 541.

¹⁰ Dawson v. Helmes, 30 Minn. 107, 111.

¹¹ Burrell v. Chicago Railway, 43 Minn. 363.

¹² Scarf v. Aldrich, 82 Pac. (Cal.) 324.

the legal title, which would be a sufficient defence in an action of ejectment.¹

The considerations governing courts in approving or rejecting sales reported for confirmation, in connection with sales by executors or administrators for the payment of debts,² are applicable, in a limited extent, to sales by guardians. Where the sale is compulsory, as it may be if the proceeds are needed for the payment of debts of the ward, or for his support and education, mere inadequacy of price ought not to be sufficient to authorize the rejection of the sale,³ unless the court be satisfied that upon a resale a better price will be obtained. The reasonable probability of realizing an advance of ten per cent. upon the amount reported, is held to justify an order for a renewed sale.⁴ But if the sale was ordered for reinvestment, it is obvious that other considerations must govern; the court should in such case be satisfied that the amount realized at the sale reported will yield a better income if invested in the manner proposed than the property; or, in other words, that the value of the proceeds so invested, together with the income therefrom, will exceed the value of the property, and its income, at the time the ward will reach majority. Where the inadequacy of price is so great as to shock the conscience, a court of equity should set aside a sale where infants are concerned.⁵ So the court will not confirm the sale of a ward's property made by his guardian, without authority, which has not proved advantageous to the ward, and where it appears that the purchaser paid in part with a debt due to him by the guardian individually, and there is a reasonable suspicion suggested by the attendant circumstances that the whole amount was to be used by the guardian, then largely in debt, for his own purposes.⁶ And so a court will, of its own motion, or at the suggestion of a mere stranger, refuse to confirm a sale if the proceedings suggest that the wards have been unfairly dealt with.⁷ Where the statute provides that a minor's land shall not be sold for less than three-fourths of

Considerations governing court in approving or disapproving sale by executor applicable to sales by guardian.

Inadequacy of price not sufficient ground to reject the sale.

¹ *Alexander v. Hardin*, 54 Ark. 480.

² See *Woerner on Administration*, § 478, p. 1060.

³ *Ayers v. Baumgarten*, 15 Ill. 444, 446.

⁴ So provided by statute in Minnesota: Gen. St. 1891, §§ 5804, 5805.

⁵ *Mitchell v. Jones*, 50 Mo. 438.

⁶ *McDuffie v. McIntyre*, 11 S. C. 551, 559.

⁷ *Ex parte, Guernsey*, 21 Ill. 443.

Sale for less than minimum fixed by statute is void.

its appraised value, the Probate Court has no jurisdiction to approve a sale shown to be in contravention of such statute.¹ Courts are vested with a sound discretion in confirming or disapproving a guardian's report of sale; but this discretion must be exercised according to established principles, and the decision may be assigned for error.² If the sale was regularly and fairly conducted, with due regard to the interests of the ward, and the terms of the order have been complied with, the purchaser is entitled to hold the property, unless the inadequacy of the price be such as to require the sale to be set aside; and, as a general principle, mere inadequacy of price is not a sufficient cause.³

§ 85. **The Deed of Conveyance.** — It appears from what is stated in the preceding section, that although the ward's title cannot be divested by the guardian's sale until such sale has been approved by the court, yet the title does not pass by the approval, but only upon the execution, acknowledgment, and delivery to the purchaser of the guardian's deed of conveyance.⁴ If, on a sale properly made and confirmed by the court, the purchaser fails to comply with the terms of the sale, he takes no title under such sale.⁵ Until the title has been divested by the execution of the guardian's conveyance, the infant may recover in ejectment, notwithstanding the confirmation of the sale and the payment of the purchase money.⁶ And so, where the sale was for cash, and the cash was not paid, the statutory lien on the property sold, provided for in cases of a guardian's sale on credit, was held to attach, as well as the equitable vendor's lien, so long as the title remained in the purchaser, his heir or grantee with notice.⁷ It is held in Missouri that where the sale by a curator under an order of the court has been regularly approved by the court, this fact of itself passes to the purchaser an equity for the legal title which will be enforced in his favor by denying recovery in ejectment by the heirs, or by vesting him with the perfect title, notwithstanding an irregular deed, or the want

¹ *Carder v. Culbertson*, 100 Mo. 269, 272.

² *Ex parte Guernsey*, 21 Ill. 443.

³ *Ayers v. Baumgarten*, *supra*, and authorities cited.

⁴ *Ante*, § 84; *Scarf v. Aldrich*, 32 P. (Cal.) 324, 327.

⁵ *Judson v. Sierra*, 22 Tex. 365, 369.

⁶ *Doe v. Jackson*, 51 Ala. 514, 517.

⁷ *Ferguson v. Shepherd*, 58 Miss. 804.

of a deed.¹ But where the statute requires the guardian's deed to be executed, acknowledged, and delivered, conveying all the right, title, and interest of the ward in the land sold, a deed not executed or acknowledged as guardian, not purporting to convey the interest of the ward in the land sold, not containing the recitals required by the statute, nor showing a sale made in accordance with the order of the court, does not pass the title of the ward.² So it has been held that where land owned by an insane person and not taxable while owned by him, was sold by his guardian under an order of court, it did not become taxable in the hands of the purchaser until the conveyance by the guardian was executed and approved by the court, although by its terms such conveyance related back and took effect some two years prior to the date of its execution.³ And the authority of a commissioner to make a deed to land sold under the decree of the court, retaining title until the purchase money is paid, cannot be exercised when such purchase money has not been actually paid, but only secured by a note.⁴ So a purchaser, to entitle himself to the rights of the highest bidder at a guardian's sale, must tender payment and performance within a reasonable time.⁵

The guardian's deed should recite the order in virtue of which the sale is made, by clear and distinct reference thereto, as well as to its date, and the authority of the grantor; it should show, also, that the notice of sale required by the order had been given: otherwise such deed will be defectively executed.⁶ And where the statute does not make a guardian's deed *prima facie* evidence that the law has been observed in its execution, the proceedings and power under which it has been executed must be shown before such deed can be offered in evidence.⁷ Without proof of the appointment of the guardian by a court of competent jurisdiction, and authority from the court to make the sale, his deed conveying land of his ward cannot be received in evidence.⁸ But if the

Insufficient deed does not pass ward's title.

Deed should recite all essential facts constituting the sale.

¹ Henry v. McKerlie, 78 Mo. 416, 428.

² Bone v. Tyrrell, 113 Mo. 175, 185.

³ Ordway v. Smith, 53 Iowa, 589.

⁴ Ex parte Macay, 84 N. C. 59. But in such case the remedy of the minor is not, in North Carolina, by action on the note and to subject the land to its payment, but

by motion in the original cause: Lord v. Beard, 79 N. C. 5, 9.

⁵ People v. Circuit Judge, 19 Mich. 296, 299.

⁶ Segee v. Thomas, 3 Blatchf. 11, 22.

⁷ Gatton v. Tolley, 22 Kans. 678, 681.

⁸ House v. Brent, 69 Tex. 27, 30, citing earlier Texas cases.

minor receive the purchase money, being the full value of the land, and never offer to return it; and if the power to sell was valid, though defectively executed; and if the vendee have gone into possession and erected valuable improvements thereon, — a court of equity will enjoin the minor from prosecuting an action of ejectment for the land so sold.¹ So a curator's deed, which

But insufficient
deed is not
necessarily
void.

does not, in apt words, convey the land as that of his ward, though signed by him as curator, and describing himself as such, is, strictly construed, his own personal deed; but such deed, failing to recite the order of court, the appraisement, time, terms, and place of sale, &c., is, for that reason defective, but not necessarily void; and it will not be cancelled when the report shows that a perfect title can be conveyed, and the parties are willing to so convey.² It is not necessary that the guardian's deed, under a license of the court, should state the reason for granting the license and making the sale;³ and informalities in the recitals, mistake of the guardian in stating the date of the license, or the insertion of irrelevant matter, should not avoid a guardian's deed given in good faith.⁴ It is sufficient if it appear by the record and the deed, that the sale and deed were made pursuant to the license, though no reference is contained in the deed to the proceedings in the Probate Court.⁵ But

Unless it show
that the statute
has been
violated.

where the statute provides that "no real estate of a minor . . . shall be sold for less than three-fourths of its appraised value," a deed showing the non-observance of the statute is void on its face.⁶ Under a statute authorizing guardians to convey their wards' land to railroads, if it is necessary for the purposes of the road, and requiring the approval of the probate judge to make such deed valid, the deed, together with a certificate of the probate judge that he has examined the deed and the sale, has found the land necessary for the purposes of the road, the consideration fair and equivalent, and the sale just and proper, and that he approves and confirms the same, is sufficient.⁷ Where a purchaser from a guardian, instead of paying or securing the purchase money, conveyed the land to a third party by deed absolute on its face, but to be held and

¹ *Segee v. Thomas*, 3 Blatchf. 11, 18.

² *Bobb v. Barnum*, 59 Mo. 394, 397.

³ *Sowle v. Sowle*, 10 Pick. 376.

⁴ *Williamson v. Woodman*, 73 Me. 163, 167.

⁵ *Menage v. Jones*, 40 Minn. 254.

⁶ *Carder v. Culbertson*, 100 Mo. 269, 272.

⁷ *Hodgdon v. South. P. R. R. Co.*, 73 Cal. 642, 649.

re-sold by the latter, and afterward re-sold it for more than the amount bid by the purchaser, and accounted for the proceeds to the guardian, this was held to be equal to a delivery, and that the title acquired was good.¹

A deed of "all the ward's share and interest" in certain land will pass both a present estate and a reversionary interest belonging to the ward in the land described.² But a guardian can insert no extra covenants in the deed which are binding upon his ward; he may make himself liable personally on such covenants (of warranty, of title, seizure, &c.),³ but the ward's estate is not affected thereby; nor is the ward estopped, by his guardian's deed, from setting up an after-acquired title.⁴

Extra covenants inserted in the deed do not bind the ward.

The sale by a guardian of his ward's real estate, if valid when made, is not rendered invalid by the subsequent resignation of the guardian, and the appointment of another in his place.⁵ So where the guardian dies, after making sale of his ward's land, under license of the court, the sale being approved and the guardian ordered to make deed, his successor may properly receive the purchase money and be compelled to complete the transaction by making deed to the purchaser. And so where the ward dies after an order of sale for payment of his debts, and before the sale is completed.⁶ The act of conveyance is rather official than personal, and more a function of the place than a matter appropriated to any individual.⁷ And on a similar theory, where a female guardian's marriage is suggested (in a State where marriage disqualifies a female as guardian of a ward's estate) after the confirmation of a sale by her of her ward's real estate, and a successor duly appointed makes the deed, it is not competent, in a collateral proceeding, to show that her marriage had taken place before the confirmation of the sale.⁸ In Tennessee a guardian, having sold his ward's

Successor may make deed of a sale by his predecessor.

¹ *Mulford v. Beveridge*, 78 Ill. 455, 458.

² *Sowle v. Sowle*, 10 Pick. 376. And see *Young v. Dowling*, 15 Ill. 481, 485, holding that if the ward had but an equitable title and subsequently acquires the legal title, equity will compel a conveyance of the legal title on the ground that it was held in trust.

³ *Mason v. Caldwell*, 10 Ill. 196, 207, referring to *Sumner v. Williams*, 8 Mass.

162, 172; *Whiting v. Dewey*, 15 Pick. 428, 433.

⁴ *Young v. Lorain*, 11 Ill. 624, 640; *State v. Clark*, 28 Ind. 138, 140; *Erwin v. Garner*, 108 Ind. 488.

⁵ *Herndon v. Lancaster*, 6 Bush, 483, 485.

⁶ *Wingate v. James*, 121 Ind. 69, 73.

⁷ *Lynch v. Kirby*, 36 Mich. 238.

⁸ *Carr v. Spannagel*, 4 Mo. App. 285.

land without authority, subject to the approval of the Chancery Court, will not be required, upon the court's confirmation of such sale, to execute deed with covenant to the purchaser; the decree divesting and vesting title is sufficient in such case.¹

The order for the sale of land does not operate *in praesenti* to convert the land into assets in the hands of the guardian, so as to prevent a judgment against the ward from operating as a lien on the land; nor does the title of the purchaser at the guardian's sale relate back to the order of the sale so as to prevent any intervening lien or rights.² The title remains in the heir until the contract of sale is executed by the payment of the purchase money and the execution of the deed.³

§ 86. **Mortgaging the Real Estate of Minors.**—It has already been stated that guardians have no power to mortgage their

Power to mortgage real estate of minors is purely statutory.

wards' real estate without being authorized thereto by a court in pursuance of a statute conferring jurisdiction to that effect on the court,⁴ and that, as a general rule, the power conferred to sell real estate does not include the power to mortgage it.⁵ Lord St. Leon-

ards, in a case turning upon the construction of a power, given by will, gives it, after reviewing the authorities, as his opinion of the English law on this subject, that a power of sale out and out, and having an object beyond the raising of a particular charge, does not

Power of sale out and out does not include power to mortgage;

authorize a mortgage; but a power for raising a particular charge, where the estate is settled or devised subject to that charge, may support a mortgage as a conditional sale.⁶ Judge Cooper, in the above-mentioned case of *Stokes v. Payne*,⁷ also adopts the distinction

secus where power to sell is means for another purpose.

drawn in an ancient case,⁸ "that where a man has power to make leases, etc., which shall charge and encumber a third person's estate, such power shall have a rigid construction; but where the power is to dispose of a man's own estate, it is to have all the

¹ *Hurt v. Long*, 6 Pickle, 445, 457.

² *Shaffner v. Briggs*, 36 Ind. 55, 57.

³ *Erb v. Erb*, 9 Watts & S. 147.

⁴ *Ante*, § 54, p. 177, and authorities there cited.

⁵ *Ib.*, citing *Stokes v. Payne*, 58 Miss. 614, in which Judge Cooper reviews numerous authorities *pro* and *con*, and

concludes that the mere power to sell does not include the power to mortgage.

⁶ *Stronghill v. Anstey*, 1 De G. M. & G. 635, 645. See also *Tyson v. Latrobe*, 42 Md. 325, 337.

⁷ 58 Miss. 614, 617.

⁸ *Sayle & Freeland*, 2 Vent. 350.

favor imaginable.”¹ It is held in Iowa, that under a petition by a guardian asking for an order to sell real estate of his ward, the court has no jurisdiction to make an order authorizing him to mortgage it.²

Petition to sell does not support order to mortgage.

In most States the power is now conferred upon probate courts to authorize guardians to mortgage the property of their wards in case it be shown to be for their interest. These statutes, even more rigidly than statutes authorizing the sale of infants' real estate, should be strictly complied with, since there is always danger that the mortgage may be foreclosed, in which case the property rarely brings more than the amount of the incumbrance.³ Where the statute

Statutory provisions to be strictly complied with.

provides that the order of the court shall specify the amount to be secured by such mortgage, the rate of interest to be paid, and the length of time for which such mortgage shall be given, an order of the Probate Court failing to pass upon these questions is void, and the purchaser at a foreclosure sale under it obtains no title.⁴ In

Omission to comply with statute fatal to the mortgage.

Rhode Island, where it is held that the statutory provision requiring all applications to probate courts to be in writing is directory only,⁵ it is still held necessary that the facts appear of record to give jurisdiction for an order to mortgage a minor's real estate; and where the formalities imposed by the statute for leave to mortgage differ materially from a petition for leave to sell, a power of sale inserted in a mortgage is void, and the mortgagee will be enjoined from selling.⁶ And so where the statute requires a report to be made to the court, of the sale, leasing, or other disposition of the property, made in pursuance of the order of court, such requirements apply as well to the mortgage, as to the sale of the property; and if the guardian fail to report his agreement to mortgage, and the terms of it, the mortgage is void.⁷ In Illinois a mortgage in fee executed by a guardian on his ward's land was held unauthorized, nugatory, and void as to the ward;⁸ but the

Application must be in writing.

¹ See, to same effect, *Head v. Temple*, 4 Heisk. 34, 39; *Hubbard v. German Congregation*, 34 Iowa, 31, 37; *Bloomer v. Waldron*, 3 Hill (N. Y.), 361, 366, mentioning *Williams v. Woodard*, 2 Wend. 487, 492, as holding the contrary.

² *McMannis v. Rice*, 48 Iowa, 361, 363.

³ *Battell v. Torrey*, 65 N. Y. 294, 297.

⁴ *Edwards v. Taliaferro*, 34 Mich. 13, 15.

⁵ *Robbins v. Tafft*, 12 R. I. 67.

⁶ *Barry v. Clarke*, 13 R. I. 65.

⁷ *Battell v. Torrey*, 65 N. Y. 294.

⁸ *Merritt v. Simpson*, 41 Ill. 391.

Supreme Court of the United States decided, in a later case, that under the statutes of Illinois such a mortgage is not invalid because authorizing an absolute sale, and not expressly recognizing the right of redemption after sale, because the right of redemption exists as a rule of property, whether recognized or not in the mortgage.¹

Right to
redeem after
sale implied.

The power of a guardian to mortgage the real estate of his ward is subject, beside the express restrictions enumerated in the statute, to the implied restrictions controlling the discretion and power of both the guardian and the court; for instance, that the indebtedness secured by the mortgage must arise out of, and have some necessary or appropriate connection with, the management of the ward's estate.²

Money must
be needed for
ward's benefit.

The guardian has no right to borrow money to invest with the ward's mother, or to pay her debts, or to invest in real estate.³

The order should contain a statement of the objects to which the avails of the mortgage are to be applied, and not refer to any other paper for such specification;⁴ the

Order should
be explicit.

wards may question the validity of the mortgage, although its execution had been approved by the Probate Court, in the proceedings to foreclose,⁵ or by bill in equity to review the order, and there urge every objection which could avail on a writ of error, if that were allowable.⁶

Ward may
attack validity
of mortgage on
foreclosure.

¹ United States Mortgage Co. v. Sperry, 138 U. S. 313, 332.

² United States Mortgage Co. v. Sperry, 138 U. S. 313, 326.

³ Kingman v. Harmon, 32 Ill. App. 529, 537.

⁴ Lampman, *in re*, 22 Hun, 239.

⁵ Kingman v. Harmon, *supra*; Kings-

bury v. Powers, 131 Ill. 182, 196, following Kingsbury v. Sperry, 119 Ill. 279, 284.

⁶ Kingsbury v. Sperry, *supra*, relying on the principle (that a minor is entitled to be heard by original bill in chancery, even during his minority) announced in Kuchenbeisser v. Beckert, 41 Ill. 172, and Lloyd v. Kirkwood, 112 Ill. 329, 337.

CHAPTER XI.

OF THE EFFECT OF THE SALE.

§ 87. **Validity of the Sale.**—In view of the peculiar functions which probate courts are called on to perform,¹ and of the solicitude of courts generally to protect the property of infants against loss by the ignorance, carelessness, or bad faith of those intrusted with the care of their property, it is of the utmost importance that every step in the proceeding to sell the property of minors be taken as nearly as possible in literal compliance with the method pointed out by the statute upon which the proceeding is based. For courts, in their anxiety to shield the interests of infants, sometimes annul a sale on the ground of a very slight error, oversight, or trivial irregularity in the proceeding, if they suspect, or discover by the light of subsequent events, that the best interest of the minor has not been subserved thereby. “It is a pernicious error, fruitful of trouble and mischief, to suppose that any vague, inartificial statement of circumstances² is sufficient to authorize an order for the sale of real estate, if the applicant and the judge know all about the matter; or that the good faith and honesty in which the application is made are a sufficient safeguard against ruinous complications and litigation that may follow an oversight or mistake.”³ “It is elementary, that statutory provisions in derogation of the common law, by which the title of one is to be divested and transferred to another, must be strictly pursued, and every requisite thereof, having the semblance of benefit to its owner, must be complied with in order to divest the title.”⁴

Literal compliance with statute necessary.

Statutes divesting title of infants to land are strictly construed.

¹ See, as to the functions of probate courts, Woerner on Administration, § 11, note (2); also §§ 145, 206 *et seq.*, and § 463.

² Or even, as is often the case in practice, the dry statement of the guardian,

sworn to by him, that, in his opinion, “it would be for the best interest of the ward that his real estate be sold.”

³ Woerner on Adm. § 463, p. 1021.

⁴ Per Ruger, Ch. J., in *Ellwood v. Northrup*, 106 N. Y. 172, 185, citing the

Sale is void if appointment of guardian is void,

or if statute has not been complied with.

Thus a sale of real estate of a minor by one as his guardian, is void in law if the records show that no such appointment has been made.¹ So also where there is no petition or license covering the premises conveyed, or bond, or notice of such sale.²

But while it is true that the guardian sells his ward's property by virtue of a mere statutory power, and that his ward will not be bound by his act in so far as it is not in obedience to and in conformity with the power conferred, yet the authority of the guar-

Validity of the sale depends on the action of the court; not on the evidence by which the action is shown.

dian to make the deed, and the validity of the purchaser's title, depends upon the action of the court on the report of the sale, and not on the evidence by which its action is to be shown. If the destruction of the record evidence, or the misprision or omission of the clerk, or the mistake or carelessness of the

guardian, or of the judge, were fatal to the titles derived through administrators or guardians, no one would feel safe in buying such property. The consequences would be most deleterious to the interests of estates, and greatly diminish the price such property would bring when offered for sale by order of court.³ It is manifestly the policy of the law to uphold judicial sales.⁴ "Both law and equity guard zealously the interest of purchasers under the process of courts of law or decrees of equity."⁵ "The vex-

Policy of courts to uphold judicial sales.

atious doubts whether the purchaser could hold, and whether, years after his purchase, the sale might not be avoided and he turned out of doors, might deter many persons from bidding, and would be apt to prevent

actual bidders from offering the value of the land."⁶

Hence, courts, in passing collaterally upon the validity of the

earlier New York cases of *Atkins v. Kinnan*, 20 Wend. 241, 249; *Battell v. Torrey*, 65 N. Y. 294, 299; *Stilwell v. Swarthout*, 81 N. Y. 109, 114; and *Valentine, in re*, 72 N. Y. 184, 186. See also *Barrett v. Churchill*, 18 B. Mon. 387, 390.

¹ *Higginbotham v. Thomas*, 9 Kans. 328, 335.

² *Tracy v. Roberts*, 34 Atl. (Me.) 68. The guardian in this case had obtained due license to sell real estate of the ward, but neither the petition nor license in any way covered the premises in question,

nor had she ever taken the oath required by the law; hence, it was held that the Probate Court had no jurisdiction, and the statute of limitation to avoid such a sale does not run against the ward.

³ *Calloway v. Nichols*, 47 Tex. 327, 331; *Pennybacker v. Switzer*, 75 Va. 671, 687.

⁴ *Whitman v. Fisher*, 74 Ill. 147, 152.

⁵ Per *Simpson, J.*, in *Benningfield v. Reed*, 8 B. Mon. 102, 105.

⁶ Judge *Robertson*, in *Thornton v. McGrath*, 1 Duv. 349, 354.

title obtained by a purchaser at a guardian's sale of his ward's real estate, will carry out the true intent and meaning of the record of the proceeding, without regard to irregularities and informalities, nor allow the record to be contradicted,¹ provided that enough can be found thereon to show that the court which ordered the sale had jurisdiction.² "However irregular and erroneous the proceedings and orders of a court having jurisdiction may be, in relation to the sale and conveyance of the real estate of minor heirs, upon the petition of their guardians, yet if such proceedings and orders are not void,³ they are conclusive when questioned collaterally."⁴ In Indiana it was decided that an irregularity in the proceeding, in consequence of which the property was sold for less than its appraised value, does not avoid a sale approved by the court, if it had jurisdiction;⁵ but in Missouri, under a statute prohibiting the sale of a minor's real estate for less than three-fourths of its appraised value, the approval of a sale for a sum less than three-fourths of the appraised value is held *non coram judice*, and the sale and deed thereunder void.⁶ So it has been held in Missouri, that a sale without previous appraisement, and which was reported to the court and approved at the same term during which it had been made, was void, notwithstanding the confirmation by the court, because it had no jurisdiction to make such approval at that term.⁷ But in later cases so much of this case (as well as

If the court approving the sale had jurisdiction, neither irregularities nor informalities will be noticed in a collateral proceeding.

Sale for less than appraised value in Indiana,

in Missouri.

¹ Worthington v. Dunkin, 41 Ind. 515, 525.

² Benson v. Benson, 70 Md. 253, 258; Thaw v. Ritchie, 136 U. S. 519, 547; Kelley v. Morrell, 29 Fed. R. 736; Newbold v. Schlens, 66 Md. 585, 589; Hamiel v. Donnelly, 75 Iowa, 93; Schaale v. Wasey, 70 Mich. 414, 420; Walker v. Goldsmith, 14 Oreg. 125, 145; Brazee v. Schofield, 2 Wash. T. 209, 220; Lyne v. Sanford, 82 Tex. 58, 63; Daughtry v. Thweatt, 16 S. (Ala.) 920; Larimer v. Wallace, 36 Neb. 444, 455; Hubermann v. Evans, 46 Neb. 784.

³ *Id est*, if the court have jurisdiction to make an order in the premises.

⁴ Walker v. Hill, 111 Ind. 223, 235, citing numerous Indiana cases; Morrison v. Nellis, 115 Pa. St. 41, 46; Larimer v.

Wallace, 36 Neb. 444; Reid v. Morton, 119 Ill. 118, 131; Quesenberry v. Barbour, 31 Gratt. 491, 499, citing numerous cases from Virginia and United States courts; Fleming v. Johnson, 26 Ark. 421, 433, citing earlier cases, and followed in Guynn v. McCauley, 32 Ark. 97, 107, and announcing the law on the authority of Sturdy v. Jacoway, 19 Ark. 499, 514. See also Currie v. Franklin, 51 Ark. 338, 341, for a list of Arkansas cases so holding.

⁵ Meikel v. Borders, 129 Ind. 529.

⁶ Carder v. Culbertson, 100 Mo. 269.

⁷ Strouse v. Drennan, 41 Mo. 289, 297. "It is the duty of a purchaser," says Wagner, J., in deciding this case, "when he is about to buy real estate sold by authority of courts, to look to the order of the court, and see whether there is

Sale prematurely approved voidable.

of other cases) holding the sale void because it was prematurely reported and approved, is overruled, and it is now held that the sale is voidable on that ground.¹

The extent to which sales made by guardians of the lands of their wards are to be held absolute and unassailable in collateral proceedings, is in a number of States pointed out by statute. In Michigan, for instance, it is enacted, that in actions in which the ward or any person claiming under him contests the validity of a sale by his guardian, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear: —

“ 1. That the guardian was licensed to make the sale by a probate court of competent jurisdiction ;

“ 2. That he gave a bond which was approved by the judge of probate, in case any bond was required by the court, upon granting the license ;

“ 3. That he took the oath prescribed in this chapter ;

“ 4. That he gave notice of the time and place of sale as prescribed by law ; and,

“ 5. That the premises were sold accordingly by public auction, and are held by one who purchased them in good faith.”² It is

Petition need not be shown. held under this statute that the making of a petition by the guardian, and the filing thereof, need not be shown ;³ and, in cases arising under the administration of the estates of deceased persons, but applicable equally to guardian's sales,⁴ that the only facts necessary to show that the court had jurisdiction to grant the license are, that the decedent was an inhabitant of the county at the time of his death, that the premises were situate in the county, that letters had been granted by the Probate Court of the county, and that it licensed the sale ;⁵ that

Omissions not fatal to sale. neither the omission to verify the petition, nor the failure to appoint guardians for the infant heirs,

authority to sell, and, if so, what are the conditions and restrictions incident to its exercise. He must see that the terms, on which the power to sell depends, have been complied with ; when this is done, he will be safe in buying, and his title will not be destroyed or vitiated by anything which takes place afterward : ” p. 299.

¹ See *ante*, § 83.

² How. Stat. 1883, § 6102.

³ *Dexter v. Cranston*, 41 Mich. 448, 451 ; *Blanchard v. DeGraff*, 60 Mich. 107, 110.

⁴ How. Stat. § 6076.

⁵ *Howard v. Moore*, 2 Mich. 226.

nor the omission in the report of sale to state the price at which the land was sold, invalidate the sale;¹ and that the truth or falsity of the allegations in the petition cannot be inquired into collaterally.² The same provisions are contained in the statutes of Minnesota,³ where it is held that if the sale lack any of the requisites prescribed in the statute, it must fall, no matter what arguments *ab inconvenienti* may be urged against such determination;⁴ but it is not necessary to show that there was a proper petition for the license to sell,⁵ nor can the validity of the guardian's appointment be assailed.⁶ So in Oregon,⁷ Washington,⁸ and Wisconsin.⁹ In the latter State it was decided that by the court having jurisdiction is meant the Probate Court of the county in which the deceased resided at the time of his death, and which had jurisdiction of the estate,¹⁰ and that whether the premises are held by a purchaser in good faith is a question of fact for the jury.¹¹ There must be a valid petition, in order to call the jurisdiction of the court into existence, or the sale will be void.¹² Similar statutes exist in other States.¹³ In many of them provisions exist also, declaring sales made by guardians, when impeached by any person claiming title adversely to the title of the ward, or claiming under a title that is not derived from or through the ward, not void on account of any irregularity in the proceedings, if the guardian was authorized to make the sale by the proper court, and accordingly executed and acknowledged in legal form a deed for the conveyance of the premises.¹⁴

Truth of allegations not to be questioned.

Good faith a question for the jury.

Sales upheld when collaterally assailed by claimants under adverse title.

¹ Coon v. Fry, 6 Mich. 506.

² Griffin v. Johnson, 37 Mich. 87, 91. See, on this point, also *post*, § 88.

³ Gen. St. 1891, § 5813.

⁴ "Whatever presumptions resting upon considerations of public policy, or upon any other foundation, are allowed in behalf of the validity of the proceedings of probate courts, they cannot be permitted to overcome plain and express provisions of statute:" Montour v. Purdy, 11 Minn. 384, 402.

⁵ Rumrill v. First National Bank, 28 Minn. 202.

⁶ Davis v. Hudson, 29 Minn. 27, 32.

⁷ Hill's Ann. L. 1892, § 3132. All proceedings had are presumed to be regu-

lar and according to law, except as to the particulars mentioned: Gager v. Henry, 5 Sawy. 237, 245; unless these appear of record, the sale is invalid and void: Hobard v. Upton, 2 Sawy. 302; the appointment of the guardian cannot be assailed collaterally: Walker v. Goldsmith, 14 Oreg. 125, 132.

⁸ Hill's St. and Codes, 1891, § 3066.

⁹ Sanb. & Merrym. Stat. 1889, § 3919.

¹⁰ Reynolds v. Schmidt, 20 Wis. 374, 380.

¹¹ Mohr v. Porter, 51 Wis. 487, 506.

¹² Schafer v. Luke, 51 Wis. 669, 673.

¹³ For instance, in Massachusetts: Publ. St. 1882, ch. 142, § 18.

¹⁴ By way of illustration, the statutes

So there may be statutory prescription or limitation to the impeachment of a guardian's sale on the ground of informality.¹ Such a statute has no application to cases of appeal, writs of error, or other process bringing up the matter for review before an appellate court;² nor will it bar an action in a case where the sale was absolutely void for the want of jurisdiction in the court to order it;³ and only where the purchaser has taken and held continuous possession of the premises for the statutory period.⁴ In Massachusetts the party need not establish a valid sale before availing himself of this statute.⁵

It may be mentioned, as a self-evident proposition, that a purchaser in good faith, from an officer empowered to sell by the decree of a court having jurisdiction to that effect, obtains a good title which is not affected by the subsequent reversal of the decree,⁶ or misapplication of the purchase money,⁷ or other error subsequently committed by the court or guardian.⁸

§ 88. **Rights of Purchasers. — Caveat Emptor.** — The guardian, in selling his ward's real estate, can self-evidently convey such title only as the ward possesses, and the rule *caveat emptor* applies, as in all judicial sales.⁹ The purchaser at a guardian's sale acts at his peril, as a general rule; he must make inquiry as to the title, and as to the authority of the guardian to sell.¹⁰ If he takes a deed without warranty, he risks such title as the guardian, having been regularly authorized to sell by the court, can convey, provided there be no fraud or misrepresentation.¹¹ But the rule of *caveat emptor* never applies to

of Oregon: Hill's Ann. L. 1892, § 3134; or Washington: Hill's St. and Codes, 1891, may be mentioned.

¹ After five years in Arkansas: Guynn v. McCauley, 32 Ark. 97, 109; Iowa: Pursley v. Hayes, 22 Iowa, 11; Louisiana: Fraser v. Zylicz, 29 La. An. 534, 536; Minnesota: Smith v. Swenson, 37 Minn. 1; Massachusetts: Holmes v. Beal, 9 Cush. 223, 227; Maine: Tracy v. Roberts, 34 Atl. (Me.) 68.

² Pursley v. Hayes, *supra*.

³ Good v. Norley, 28 Iowa, 188, 201; Rankin v. Miller, 43 Iowa, 11, 21.

⁴ Washburn v. Carmichael, 32 Iowa, 475, 479.

⁵ Holmes v. Beal, *supra*.

⁶ Whitman v. Fisher, 74 Ill. 147, 157; Wampler v. Wolfinger, 13 Md. 337, 348. See Ror. on Jud. Sales, § 132, and authorities.

⁷ See, as to application of purchase money, *post*, § 91.

⁸ Mulford v. Beveridge, 78 Ill. 455, 460.

⁹ Rorer on Jud. Sales, § 174.

¹⁰ Guynn v. McCauley, 32 Ark. 97, 112; Black v. Walton, 32 Ark. 321, 324.

¹¹ Byrd v. Turpin, 62 Ga. 591, 594.

cases of fraud.¹ If land is purchased from a guardian on his representation that the purchaser would acquire a good title, the purchaser will not, in law or equity, be compelled to accept a worthless deed,² no matter whether the guardian did or did not know that his statements were false.³ But if the purchaser seek to avoid a guardian's sale on the ground of misrepresentation, undue concealment, or of any act of the guardian amounting in the estimation of a court of equity to fraud, he must offer to restore the possession to the guardian, and to account for the rents and profits during the time of his occupation.⁴ In an action by a guardian for the unpaid purchase money, in which the defence is made that the guardian had deceived and misled the purchaser, it is competent for the guardian to show, by parol evidence, that the purchaser knew before the sale of the claims asserted to the property, and that he had expressly agreed to assume the risk, taking his chances against them as to the land.⁵ Nor can the purchaser object, in a foreclosure proceeding, that the title is defective.⁶ The purchaser is not required to investigate the truth of the matter stated in the bill (petition) and deposed to by the witnesses; the title is not affected by the fact that the case made by the record is not warranted by the facts.⁷ But in purchasing from a guardian, he is presumed to have knowledge of the proceedings;⁸ so that for the failure of his title by reason of the omission of any formalities required by the statute to divest the title of the infant at law, he will have no remedy in equity.⁹ Hence, if

but is no protection to guardian's fraud.

Knowledge by purchaser of defect in title may be proved to rebut fraud of guardian.

Purchaser from guardian presumed to have knowledge of proceedings,

¹ Story on Sales, § 378.

² *Black v. Walton*, *supra*.

³ "For the affirmation of what one does not know or believe to be true is equally, in morals and in law, as unjustifiable as the affirmation of what is known to be positively false:" *Black v. Walton*, *supra*, p. 326.

⁴ *Shipp v. Wheelless*, 33 Miss. 646, 652. To same effect: *Loyd v. Malone*, 23 Ill. 43, 49.

⁵ *Byrd v. Turpin*, 62 Ga. 591, 595.

⁶ "Let the title be what it may, the land can be made subject to a mortgage for a part of its own purchase money:" *Byrd v. Turpin*, *supra*.

⁷ *Durett v. Davis*, 24 Gratt. 302, 309, referring to *Walker v. Page*, 21 Gratt.

636, 645; *Kendrick v. Wheeler*, 85 Tex. 247, 253; *Griffin v. Johnson*, 37 Mich. 87, 91.

⁸ *Axtell, in re*, 54 N. W. (Mich.) 889.

⁹ "It is a well-settled doctrine, that although courts of equity may relieve against the defective execution of a power created by a party, yet they cannot relieve against the defective execution of a power created by law, or dispense with any of the formalities required thereby for its due execution, for otherwise the whole policy of the legislative enactments might be overturned:" *Caton, J.*, in *Young v. Dowling*, 15 Ill. 481, 487, quoting from *Story, J.*, in *Bright v. Boyd*, 1 Story, 478, 487.

and has no
remedy in
equity for fail-
ure of title by
irregularity.

there is no report of the sale to, or approval by, the court having ordered it, the sale is void and the purchaser takes nothing, although he paid the purchase money, supposed his title to be good, and erected valuable improvements on the land.¹ And where the court ordered a sale for \$1,600, — \$400 cash and \$1,200 secured by mortgage, — and the guardian's solicitor negotiated the sale for \$1,800, but took personal property for part of the cash and part of the mortgage, which the guardian refused to accept, and the solicitor reported the sale as prescribed in the decree, it was held, in a suit for the purchase money, that the sale would be enforced for the \$1,800, and that the price above the amount of the mortgage must be paid in cash.² And so the Supreme Court of Ohio reversed the decision of a trial court, granting equitable relief against a mistake made by a guardian in the description of the land intended by all the parties to be included in the description, whereby the purchaser lost a part of the land for which he had paid.³

A purchaser who pays a guardian the purchase money without making inquiry, under circumstances which would put a man of ordinary prudence on his guard, cannot be treated as an innocent purchaser.⁴ One who knowingly receives from a trustee the trust money or property in satisfaction of the individual debt of the trustee to him, must be regarded as participating in the fraudulent diversion of the property, and is liable to the beneficiary in the trust.⁵ The guardian has no right, nor has his agent in negotiating the sale, to receive, in payment for land of his ward sold by him, his own or his agent's promissory note or other individual obligation held by the purchaser; and if in such case the guardian fail to account to the ward for the purchase money, the latter has an action against the purchaser either for the purchase money, or to have the sale set aside, such sale depriving the ward of no rights, so long as the property, or the proceeds thereof, can be traced in the hands of any one having full knowledge of all equities.⁶

Purchaser
paying by dis-
charge of
guardian's
debt to him,
participates in
fraud,

and is liable to
the ward.

¹ Young v. Dowling, *supra*.

² Axtell, *in re*, 54 N. W. 889.

³ Dickey v. Beatty, 14 Oh. St. 389.

⁴ Guynn v. McCauley, 32 Ark. 97, 116;

Anderson v. Layton, 3 Bush, 87, 88;
Whitehead v. Bradley, 87 Va. 676, 679.

⁵ Wallace v. Brown, 41 Ind. 436, 438.

⁶ Bevis v. Heflin, 63 Ind. 129, 134, *cit*

Until payment of the purchase money, the land remains in *custodia legis*, and courts of equity exercise discretionary power for the benefit of the parties before them, especially where they are infants. For error, mistake, misunderstanding, or misrepresentation as to the terms or manner of sale, courts will set it aside.¹ They have power to decide how payment shall be made, and to decree title, although no other payment than an interchange of notes was made, if that was intended and regarded by the court as payment, and the purchaser will get a good title.² And a court invoked to set aside a guardian's sale has power to attach conditions, and may order the purchase money to be returned before setting the sale aside.³

Courts may order payment of purchase money, or set aside the sale.

Courts will decree the repayment of purchase money as a condition to the setting aside of irregular or voidable sales, if the purchaser have in good faith, and without notice of any defect in the title, paid the purchase money to the guardian, or applied it for the benefit of the minor.⁴ And so he is entitled to full remuneration for any lasting improvements put on the estate, for which he is said to have a lien thereon, which the absolute owner is bound to discharge before he can be restored to his original rights in the estate.⁵ The amount so recoverable is limited to the value of the improvements at the time of the recovery, and the amount of taxes paid by the purchaser on the naked land, less the amount of the rents and profits of the land without the improvements.⁶

Wards must refund purchase money if sale is set aside,

and remunerate purchaser for valuable improvements.

A sale, though irregular or void, may be validated by the ratification of the party after attaining majority, and cannot, in such case, be disturbed.⁷ Thus, the appro-

Wards may ratify sale at majority;

ing many authorities; *Thomas v. Hite*, 5 B. Mon. 590, 597; *Black v. Keenan*, 5 Dana, 570.

¹ *Bolgiano v. Cooke*, 19 Md. 375, 391; *Tomlinson v. McKaig*, 5 Gill, 256, 277. And see *post*, § 90.

² *Flemming v. White*, 84 N. C. 532, 540, citing and approving *Lord v. Beard*, 79 N. C. 5, and *Lord v. Merony*, 79 N. C. 14.

³ *Kendrick v. Wheeler*, 85 Tex. 247, 253.

⁴ *Parmelee v. McGinty*, 52 Miss. 475, 484, citing earlier Mississippi cases; *Gaines v. Kennedy*, 53 Miss. 103, 109;

Kendrick v. Wheeler, 85 Tex. 247, 253; but the purchaser is not entitled to repayment of the purchase money where it is not shown that it had been paid to or for the benefit of the ward: *Bone v. Tyrrell*, 113 Mo. 175.

⁵ *Hatcher v. Briggs*, 6 Oreg. 31, 46, with a review of American cases, and quoting the above language as that of Judge Story.

⁶ *Summers v. Howard*, 33 Ark. 490, 495, and authorities.

⁷ *Meikel v. Borders*, 129 Ind. 529, 532.

priation by the parties, when of age, of the proceeds of the sale, with full knowledge of the facts and circumstances, or acquiescence for many years, will estop them from claiming the land.¹ It was held in Minnesota, that a minor may, on reaching majority, elect to let a void sale of his lands made by his guardian stand, and hold the latter liable on his bond for the purchase money.²

Where the owner of a mortgage becomes purchaser at a guardian's sale of real estate, subject to such mortgage, there is no occasion to exact a bond from him to discharge it, since the effect of the transaction is to cancel the mortgage in his hands.³

The purchaser of an undivided interest at a guardian's sale cannot object to the setting apart to one of the wards, on reaching majority, of her interest in the remainder.⁴

§ 89. **Purchase of the Ward's Estate by or for the Guardian.** — In a number of States, it is provided by statute that executors, administrators, or guardians shall not buy the land of their wards, or any part thereof, or interest therein. Sales made in contra-

vention of this inhibition are mostly declared void or voidable at the option of the ward on attaining majority, or even during minority, by a proceeding to that end. Under a statute prohibiting a guardian, next friend, or witness, to purchase property sold under a decree in certain cases referred to, it was intimated that such inhibition applied only to sales under the chapter in which it is found; and

if so, would not prohibit a guardian from purchasing in sales made under a different chapter of the statutes.⁵ So where a statute provided that "no executor, administrator, or guardian making the sale shall directly or indirectly purchase, or be interested in the purchase of, any part of the real estate so sold, and all sales made contrary to the provisions of

¹ Walker v. Mulvean, 76 Ill. 18; Davie v. Davie, 18 Southw. (Ark.) 935, 937; Brazee v. Schofield, 2 Wash. Ter. 209, 218; Handy v. Noonan, 51 Miss. 166, 169, citing other Mississippi cases; O'Connor v. Carver, 12 Heisk. 436, 439; Hoyt v. Sprague, 103 U. S. 613, 636; Fender v. Powers, 62 Mich. 324; Howery v. Helmes, 20 Gratt. 1, 8.

² Tomlinson v. Simpson, 33 Minn. 443.

³ Lynch v. Kirby, 36 Mich. 238, 242.

⁴ Henson v. Phipps, 21 Southw. (Tex.) 772.

⁵ Hawkins v. England, 3 Head, 652, 654.

this section shall be void," it was held that such sale was not absolutely void, but only voidable by the parties interested in the estate sold, and cannot be avoided by them as against a *bona fide* purchaser.¹ On the effect of a statute substantially identical in its terms, the Supreme Court of Michigan divided, and by reason of such division affirmed the decision of the Trial Court, holding a deed given by an administrator to one who immediately reconveyed to the administrator, to be absolutely void, as against the heirs of the administrator's intestate, and even against a *bona fide* purchaser from the nominal purchaser at such sale.² A similar statute in New York was construed as making the sale void, so that the interest of the minor owners is not affected thereby.³ In Texas such sale will be set aside, even after the guardian has conveyed the property to another.⁴

But apart from statutory provisions, a rule in equity, well established now in the United States, prohibits any person from purchasing what it is his duty to sell on account of another: he is not allowed to unite the two characters of buyer and seller.⁵ This rule is fully applicable to guardians and wards,⁶ and avoids such sales as effectually, where the

¹ *White v. Iselin*, 26 Minn. 487, 490.

² At least where the administrator's deed has never been recorded: *Hoffman v. Harrington*, 28 Mich. 90. The question is thoroughly discussed in this case by Chief Justice Christiancy on the one side, with whom Cooley, J., concurred, holding that the statute, *ex vi termini*, annulled such sale, so that no title whatever can pass thereby, and that the equities are at least as strong in favor of an innocent heir as they are in favor of an innocent purchaser; and by Graves, J., on the other side, with whom Campbell, J., concurred, holding the statute to show a mere adoption by the legislature of what courts had theretofore held to be the rule without statute, that such a sale was only voidable, and therefore passed a good title to a *bona fide* purchaser.

³ *Forbes v. Halsey*, 26 N. Y. 53, 65. "It is now well settled in this State, that a guardian, trustee, or other person standing in the relation of a fiduciary capacity, cannot deal with or purchase the property in reference to which he holds the relation

(citing *Gardner v. Ogden*, 22 N. Y. 327). The usual and ordinary right and remedy of the *cestui que trust* is, to affirm the sale and claim its enhanced value, or to hold the fraudulent trustee to the sale. He has his election within a reasonable time to do either. The sale is not therefore void, but voidable only at the election of the *cestui que trust*. But in reference to sales of the character now under consideration, we have an emphatic and clear expression of the will of the legislature, and which I see no way of overcoming in the present case. . . . The statute has, therefore, said that all such sales are void, and consequently no title passed thereby." This case was cited and followed in *Terwilliger v. Brown*, 44 N. Y. 237, 241, 243.

⁴ *Hampton v. Hampton*, 29 S. W. (Tex. C. App.) 423.

⁵ *Michoud v. Girod*, 4 How. (U. S.) 503, 553 *et seq.*; *Davoue v. Fanning*, 2 Johns. Ch. 252, 256; *Imboden v. Hunter*, 23 Ark. 622.

⁶ *Collins v. Smith*, 1 Head, 251, 256;

Whether the
sale be direct,
or through
another.

guardian obtains the title through another, as if he buy directly for himself. No title passes by the sale and conveyance by a guardian, at a guardian's sale of his ward's property, and its immediate reconveyance to him individually by the purchaser.¹ So also two deeds, one executed by an attorney in fact in the name of his principal, the other by his grantee, on the same day, to the attorney in fact, for the same land, are *prima facie* void; and a purchaser from the attorney in fact is not a purchaser in good faith in the legal sense.² The relation between guardian and ward is so intimate, the dependence so complete, the influence so great, that any transaction between the two parties, or by the guardian alone, through which the guardian obtains a benefit, entered into while the relation exists, are in the highest degree suspicious; the presumption against them is so strong that it is hardly possible for them to be sustained. This doctrine of equity applies even after the legal condition of guardianship is ended, so long as the dependence on one side and influence on the other continue; and influence is presumed so long as the guardian's functions remain, to any extent, unperformed.³ Hence, if a guardian procures land of his ward to be sold, and to be purchased by a nominal bidder in the guardian's behalf, who executes a recognizance for the value of the ward's interest; and thereupon the purchaser conveys the land to the guardian in his own name, and soon thereafter the guardian enters satisfaction on the record, without having received the money due thereon,—such conduct is a fraud in equity; and the ward's lien on the land under the recognizance may be enforced, even after the ward has come of age, and against a subsequent purchaser of the land having notice.⁴ The *cestui que trust* has his election to treat the sale as a nullity, not because there is, but because there *may be*, fraud.

Such sale void-
able after ma-
jority of the
ward.

The inhibition is directed against all persons who may by their

Brockett v. Richardson, 61 Miss. 766, 781; Wallace v. Jones, 93 Ga. 419.

¹ Winter v. Truax, 87 Mich. 324; Beaubien v. Poupard, Harr. Ch. 206; Woodruff v. Cook, 2 Edw. Ch. 259, 262; Lane v. Taylor, 40 Ind. 495, 503.

² McKay v. Williams, 67 Mich. 547;

to similar effect: Walker v. Walker, 101 Mass. 169.

³ Per Saulsbury, Ch., in Willey v. Tindal, 5 Del. Ch. 194, 198.

⁴ Willey v. Tindal, *supra*; to same effect: Patton v. Thompson, 2 Jones Eq. 285.

⁵ Brothers v. Brothers, 7 Ired. Eq. 150.

action in any way have an influence in bringing about or accomplishing the sale, or who act in the interest of the guardian. Hence, the sale to a judge of probate who ordered it will be set aside.¹ So where the sale of land is decreed under a statute because manifestly to the interest of the persons under disability, the sale will be void if the purchaser be one of the witnesses on whose testimony the court found it to be to the owner's interest to sell, the statute inhibiting a sale in such case to the guardian, next friend, or witness, within five years after removal of the disability.² But this statute is held not to apply to a witness who merely stated that he was willing to buy at a price specified.³ The sale to one of the appraisers of the premises sold is held voidable, though not void;⁴ and the guardian's wife is held to take no title at her husband's guardian sale.⁵ *Quasi* guardians, and all other persons occupying the relation of confidential advisers, have been held to come within the rule;⁶ hence, if one purchases the land of an infant to whom he stands *in loco parentis*, the purchase will, at the minor's instance, be declared a trust for his benefit, regardless of the good faith of the transaction.⁷

Rule applies to all in privity with the guardian.

Judge of probate.

Witness.

Appraiser.

Guardian's wife.

One *in loco parentis* to ward.

Unless so provided by statute, however, such sales are not absolutely void, in the sense of being a nullity, but pass the estate, subject to be defeated by the wards, but only against the guardian, or one claiming under him with knowledge of the circumstances of the sale, or a purchaser who has not paid a full and valuable consideration. If before the sale is avoided the estate has been transferred to a subsequent *bona fide* purchaser, upon good and sufficient consideration, without notice that it had been bought at a guardian's sale for the guardian's benefit, such grantee will hold the same as against the wards.⁸ Such sales are usually said to be voidable, but not void.⁹ The wards may take the land

Such sales are voidable, but not void.

Good to a *bona fide* purchaser from guardian.

¹ Walton v. Torrey, Harr. Ch. 259, 263.

² Starkey v. Hammer, 1 Baxt. 438, 444.

³ Hunt v. Glenn, 11 Lea, 16.

⁴ Terrill v. Auchauer, 14 Oh. St. 80, 83.

⁵ Rome Land Co. v. Eastman, 80 Ga. 683, 691.

⁶ Battle, J., in Hindman v. O'Connor, 54 Ark. 627, 632, citing numerous authorities.

⁷ Hindman v. O'Connor, *supra*.

⁸ Wyman v. Hooper, 2 Gray, 141, 145; Morrison v. Garrott, 22 S. W. (Ky.) 320.

⁹ Blood v. Hayman, 13 Metc. (Mass.) 231, 236, and Massachusetts cases cited;

Ward may take land, or sue for the money.

Vendee holds in trust for ward.

in specie in satisfaction of their claim against the guardian, or elect to sue the guardian on his bond; but having brought suit for the money, they cannot claim the land in specie.¹ And where a guardian procures the title to his ward's property, he holds it subject to the ward's equity for the purchase money, and the ward will be entitled to be first satisfied out of the proceeds of sale.²

There are cases holding that the invalidity of the purchase by a guardian of his ward's property does not attach to sales made

Purchase good if for benefit of ward where the guardian acted fairly,

under order or decree of a court of competent jurisdiction, where the guardian's conduct will be watched with jealousy. In such case the guardian may purchase; and if it be manifest that he has acted fairly,

with the utmost good faith, and the transaction is free from any imputation of a design on his part to gain a benefit to himself, to the prejudice of the interests of his ward, such purchase will be held valid.³ But if the price paid by the guardian be less than the appraised value, he must prove the price to be reasonable

and may be enforced against the guardian on his bond.

before the sale can stand.⁴ So the purchase by a guardian will be enforced against him and his sureties, if such be to the interest of the wards.⁵

The purchase by a guardian at a tax sale of his ward's land conveys no title to him nor to his assignee.⁶ And a guardian having sold his ward's land has no right to protect the purchaser at such sale by purchasing it for him, at a subsequent administrator's sale, to pay the debts of the ward's ancestor.⁷

§ 90. **Payment of the Purchase Money.**—The law governing the payment of purchase money to executors and administrators, for property sold by them in their official capacity, is likewise

Bostwick v. Atkins, 3 N. Y. 53, 59; *Hoskins v. Wilson*, 4 Dev. & B. L. 243.

¹ *Beam v. Froneberger*, 75 N. C. 540, 544.

² *Small v. Small*, 74 N. C. 16.

³ *Blackmore v. Shelby*, 8 Humph. 439; approved and followed in *Elrod v. Lancaster*, 2 Head, 571, 576, *Clements v. Ramsey*, 4 Southw. (Ky.) 311.

⁴ *Crump, ex parte*, 16 Lea, 732, 735.

⁵ *Redd v. Jones*, 30 Gratt. 123; on the ground, that the rule was made to protect

the minors. "Instead of a shield of defence for which it was intended, it would be converted into a sword of destruction. For if a stranger, instead of the guardian, had been the purchaser, there could have been no doubt as to his liability:" Per *Moncure, P.*, p. 128. See, to same effect: *Moore v. Hilton*, 12 Leigh, 1, 31; *Daniel v. Leitch*, 13 Gratt. 195.

⁶ *Dohms v. Mann*, 76 Iowa, 723, 729; *Gwynn v. McCanley*, 32 Ark. 97, 111.

⁷ *State v. Clark*, 28 Ind. 138.

applicable in case of sales by guardians.¹ If the order direct a sale for cash, payment must be made in money, i. e., in such currency as is a legal tender under the Constitution and laws of the United States;² and if not so paid, the guardian is liable to his ward for the amount thereof, if he take insufficient security or fail to collect.³ It appears from a previous statement,⁴ that without special authorization of court the guardian is not permitted to take anything but cash in payment of the ward's share of real estate sold by him.⁵ Hence, if a guardian sell property owned in common by his ward and by his wife, and receive, with the consent of his wife, in payment of the purchase money, a part in money and a part by cancelling a debt due from him to the purchaser, equity will compel the wife to accept as her portion of the purchase price the debt thus cancelled, and decree the money to be paid to the ward.⁶ So if a guardian receive his own individual notes in payment of the ward's real estate sold by him, and fail to account for the proceeds of the sale, the purchaser may be held accountable for the trust property;⁷ or, if he has sold the same to an innocent purchaser, for its proceeds.⁸ And where a widow, pending the administration of her husband's estate, obtained as guardian of her minor children, an order of sale of their land, and conveyed one tract to the administrator, receiving her own paper in payment, the purchaser was held liable for the purchase money to the wards;⁹ and having sold him another tract, for which the purchaser never paid, but of which he took possession, although the sale was never approved, the wards recovered judgment for their interest in the land and for rents and profits.¹⁰ The application by one who was administrator of an estate, of the proceeds of a sale by him as guardian of the intestate's minor children, to the payment of the intestate's debts, is no proof that the administrator was also guardian of said children, although the

Payment must be in legal currency.

If guardian take his individual notes in payment, or the cancellation of a debt due by him, purchaser will be held accountable.

¹ See Woerner on Administration, § 333, as to personal, and § 479 as to real, property.

² *Kitchell v. Jackson*, 44 Ala. 302; *Macay, ex parte*, 84 N. C. 59, 63, citing earlier North Carolina cases.

³ *Hudgins v. Cameron*, 50 Ala. 379, 382.

⁴ *Ante*, § 82.

⁵ *Brenham v. Davidson*, 51 Cal. 352, 356.

⁶ Wherefore, in such case, the ward has no claim against the purchaser: *Brenham v. Davidson, supra*.

⁷ *Wallace v. Brown*, 41 Ind. 436.

⁸ *Wallace v. Brown, supra*.

⁹ *Ambleton v. Dyer*, 53 Ark. 224, 233.

¹⁰ *Ambleton v. Dyer, supra*.

Probate Court indorsed upon or annexed to the conveyance its approval and confirmation.¹

So long as the land of a ward sold by his guardian remains in possession of the purchaser, or of his heirs, or grantees with notice, it may, as a general rule, be subjected to sale under the equitable lien of the vendor, for the satisfaction of the purchase money;² and this, although there be a special lien created by statute to secure the purchase money on lands sold by guardians under judicial decree;³ the minor may proceed under either remedy.⁴ The lien on property sold under probate decree results from the sale; no special reservation thereof need be made in the deed, and the property is liable for the payment of the purchase money just as if a mortgage had been taken.⁵ But where a guardian agreed with one for whom he acted as agent, to loan his principal's money on the security of his ward's real estate, such principal has no lien on the ward's estate if the guardian has not executed a mortgage, nor accounted for the money to his ward.⁶ And so where land was conveyed to a guardian in payment of a debt due the ward, and the guardian conveyed a part thereof to a trustee for the benefit of the debtor's children, such deed of trust was held fraudulent and void;⁷ and the guardian executing a deed of trust on his ward's land, which he had taken in his own name, is liable on his bond for the value of the land.⁸

On the other hand, since the infant is to be considered the ward of the court from the time the application is made to a court of chancery for the sale of the infant's land, so far as relates to the property sold, its proceeds and income; and since the special guardian is an officer of the court, the court having control over the purchase money so long as it remains in his hands, such court may correct any irregularities or error on the part of its officers, in the proceedings, so as to protect a party likely innocently to suffer thereby.⁹ But a guardian has no

Court may correct irregularities and errors so long as purchase money is in hands of its officers.

¹ *Burrell v. Chicago R. R. Co.*, 43 Minn. 363, 366.

² See authorities on this point collected by Tiedeman, in his treatise on the American Law of Real Property, § 292.

³ *Ferguson v. Shepherd*, 58 Miss. 804.

⁴ *Miller v. Helm*, 2 Sm. & M. 687, 697.

⁵ *Lambeth v. Elder*, 44 Miss. 80, 87.

⁶ *Noble v. Runyan*, 85 Ill. 618.

⁷ *Roland v. Thompson*, 73 N. C. 419.

⁸ *State v. Tittmann*, 54 Mo. App. 490.

⁹ *Matter of Price*, 67 N. Y. 231, 234, approving this principle as announced in *Davison v. De Freest*, 3 Sandf. Ch. 456, 465.

power to rebate any portion of the purchase money of property of his ward sold under a mortgage, on the ground that a part of the land embraced in the mortgage was not the property of the mortgagor; the guardian and purchaser have no authority to determine the question of the mortgagor's title.¹

Guardian has no power to rebate purchase money on defect of title.

§ 91. **Application of the Purchase Money.** — The statutes of many States provide for the application of the proceeds of sale of real estate of minors, by directing, in most cases, that where the sale was ordered for reinvestment, such reinvestment shall be made in the manner pointed out by statute, or ordered by the court; and where the sale was ordered for the purpose of obtaining the means to support and educate the ward, so much of the proceeds as may be necessary are to be used for such purpose, and the residue invested. It is held in Massachusetts, that proceeds of a sale for reinvestment cannot be used by the guardian for the ward's support, unless it be made clearly to appear that, subsequently to the granting of the license to sell and invest the proceeds, the same became necessary for his support, and that the ward was unable to support himself in a suitable and proper manner without expending such proceeds.² So where land is sold under an act authorizing the sale of lands limited over or in contingency, the whole of the proceeds of such sale must be invested for the benefit of the owners of such interest, and the Chancellor can make no other disposition of the fund.³ The assent of the ward to an unauthorized investment of the proceeds of sale of his real estate cannot, obviously, exonerate the guardian from liability for misapplication of the fund.⁴ Where the guardian has been ordered to mortgage his ward's real estate and apply the proceeds thereof to the payment of certain specified debts, he cannot refuse to pay such debts on the ground that the ward is not liable therefor.⁵

Proceeds of sale not to be diverted from the purpose for which sale was ordered.

So, likewise, it is enacted in many States, that the proceeds of the sales of real estate of minors shall, for the purposes of the succession, retain the character in which the minors owned it before the sale.⁶ In the

Sale does not change the rights of owners.

¹ Taylor v. Hite, 61 Mo. 142, 147.

² Strong v. Moe, 8 Allen, 125.

³ Cool v. Higgins, 23 N. J. Eq. 308, 311.

⁴ Harding v. Larned, 4 Allen, 426.

⁵ Lampman, in re, 22 Hun, 239.

⁶ Lerch v. Oberly, 18 N. J. Eq. 575, 580; Holmes's Appeal, 53 Pa. St. 339, 342; Vaughan v. Jones, 23 Gratt. 444.

absence of a statutory determination of the question, the applicability of the equitable rule seems well established, that when at the time of the sale of mortgaged premises under a decree of foreclosure the equity of redemption therein is owned by a minor, and a surplus arises from the sale, his interest therein is deemed real estate, and will be disposed of as such at his death, if he dies under age; even when it has been invested by the court in personal securities, for the benefit of the infant. The court will so control the proceeds until he becomes of age, that he may take it as money or land, as he may then elect.¹ This principle has been carried to the extent of denying the transfer of the proceeds of sale of a non-resident minor's real estate to the state of his domicil, although the statute authorized "the proceeds of any sale made under a decree of a court of equity, etc." to be transferred to a guardian regularly appointed in the place where the infant resides;² and applies to sales incident to partition proceedings³ and to sales under a special act of the legislature.⁴ There are isolated cases to the contrary, notably *Emerson v. Cutler*,⁵ *Bogert v. Furman*,⁶ *Biggest v. Biggest*,⁷ and *Grider v. McClay*,⁸ but the very decided preponderance is as above stated. The converse is equally valid, namely, that where an infant's money is invested in the purchase of real estate, the same descends as personal property on the infant's death before attaining majority.⁹

¹ *Swezey v. Thayer*, 1 Duer, 286; *Craig v. Leslie*, 3 Wheat. 563, 577 *et seq.*; *Moses v. Murgatroyd*, 1 Johns. Ch. 119, 130; *Lloyd v. Hart*, 2 Pa. St. 473; *March v. Berrier*, 6 Ired. Eq. 524, citing earlier North Carolina cases; *Fidler v. Higgins*, 21 N. J. Eq. 138; *Lerch v. Oberly*, *supra*; *Erb v. Erb*, 9 Watts & S. 147; *Faulkner v. Davis*, 18 Gratt. 651.

² On the ground that it was the intention of the legislature that money arising from the sale of an infant's real estate should be preserved as land, as near as possible, consistent with the proper maintenance of the infant, and that it should be kept within that jurisdiction, which would control its transmission as land to those entitled as heirs, under the laws of the State where the land was situated: *Clay v. Brithingham*, 34 Md. 675, 679, 682. From this opinion of the majority of the Maryland Court of Appeals,

Grason, J., and *Bartol, C. J.*, dissent, p. 682.

³ *Horton v. McCoy*, 47 N. Y. 21, 27; *Oberle v. Lerch*, 18 N. J. Eq. 346.

⁴ *Snowhill v. Snowhill*, 2 N. J. Eq. 30, 36.

⁵ 14 Pick. 108, 118. In his reasoning Judge Shaw compares the conversion during the disability of a minor or lunatic to the alienation of his estate by an adult owner, deducing the same result in both cases, thus, apparently, ignoring the basis of the equitable rule, which permits no will but that of an owner *sui juris* to determine the devolution of his property.

⁶ 10 Paige, 496, 499, Chancellor Walworth correcting the report of the master, but without arguing the point or citing authorities.

⁷ 7 Watts, 563.

⁸ 11 Serg. & R. 224.

⁹ *Davis's Appeal*, 60 Pa. St. 118, 121.

When the ward attains majority, and obtains possession of the property, no election is necessary ; but the character impressed upon the proceeds of the sale by the doctrine of equitable conversion, is gone, — according to the doctrine, that where equity impresses a different quality upon property from that which it has in fact, such impression ceases whenever the possession of the estate and the right to it, in each quality, meet in the same person ; that is, when no person but the one who has the actual possession, has an equitable interest in retaining the fictitious character of the estate.¹ But this is true only, if possession accompanies the title ; if the money be in the possession of a third party, some act must be done by the person entitled to show that he considers it as money, otherwise it will still be deemed land.²

Property regains its original character on ward's majority,

unless in possession of a third party.

The purchaser is not, of course, responsible for the misapplication of the purchase money, either by the guardian or by the order of the court.³ Upon the payment of the purchase money into court, and the filing of a sufficient bond by the tutor of a minor having an undivided interest in the property sold, for the protection of his ward's interest in the purchase money, the purchaser obtains a good title to such minor's interest.⁴

Purchaser is not responsible for misappropriation.

§ 92. **Partition and Sale of Undivided Lands descending to Heirs or Devisees.** — The rule of the devolution of lands to the heirs or devisees, and of personalty to the executor or administrator, has produced a difference in the jurisdictional powers of probate courts in the several States over the partition of real estate.⁵ The usual rule is applied in determining the question of their jurisdiction in this respect: Unless the power has been conferred expressly, or as a necessary consequence of some other power clearly

Jurisdiction of probate courts to partition lands must be expressly conferred.

¹ *Forman v. Marsh*, 11 N. Y. 544, 549, 552, citing as authority, *Pulteney v. Darlington*, 7 Brown's P. C. 530 ; *Rashleigh v. Master*, 1 Ves. Jr. *201 ; *Wheldale v. Partridge*, 8 Ves. Jr. 227. See also *Vaughan v. Jones*, 23 Gratt. 444, 458.

² *Turner v. Dawson*, 80 Va. 841, 845.

³ *Fitzgibbon v. Lake*, 29 Ill. 165, 178 ; *Mulford v. Beveridge*, 78 Ill. 455 ; *Exendine v. Morris*, 8 Mo. App. 383, 389.

⁴ *Koehl v. Solari*, 47 La. An. 891, 895,

commended and affirmed in *Succession of Aron*, 19 S. (La.) 763.

⁵ See enumeration of the States in which this power is conferred upon probate courts, in 2 Woerner on Adm. § 567 ; and for a discussion of the concurrent jurisdiction between chancery and probate courts, in respect of partition, *Ferris v. Higley*, 20 Wall. 375, 379, and *Robinson v. Fair*, 128 U. S. 53, 76.

given, it does not exist in probate courts.¹ It was held in South Carolina, where the constitution defines the powers of the several kinds of courts, that an act of the legislature conferring this power was unconstitutional, because the power was not mentioned in the constitution;² but this adjudication was held to have no retroactive effect, so that rights adjudicated in partition proceedings before probate courts previous to the decision of *Davenport v. Caldwell* were not thereby affected.³ Not even the appearance in court by the parties, consenting in writing to a partition reported by the commissioners, and decreeing the partition in accordance with such report, will give validity to the decree of a court upon which neither the constitution nor statute has conferred jurisdiction; nor is a certified copy of the proceedings in such case competent evidence to show partition by agreement.⁴

Concurrent
jurisdiction of
chancery
and probate
courts.

Where such power is conferred on probate courts concurrently with courts of chancery, the jurisdiction of the Probate Court, if it attaches first, becomes conclusive, unrestrained by the interference of the court of equity;⁵ but a statute providing that "the Chancery Court shall have concurrent jurisdiction with the Probate Court to . . . sell for partition or division any property, real, personal, or mixed, held by joint owners or tenants in common," gives neither the Chancery nor the Probate Court jurisdiction to sell land for division or partition, the title to which is disputed by a defendant in adverse possession.⁶ Although the jurisdiction is concurrent as to equity and probate courts, yet the former proceeds on its own established principles.⁷ A statute clothing probate courts with power to make partition of real estate in the course

¹ *Snyder's Appeal*, 36 Pa. St. 166, 168.

² *Davenport v. Caldwell*, 10 S. C. 317, 347. But see *Robinson v. Fair*, 128 U. S. 53, 79, holding a law under a similar constitutional provision valid.

³ *Herndon v. Moore*, 18 S. C. 339, 345; *Tederall v. Bouknight*, 25 S. C. 275, 280.

⁴ *League v. Henecke*, 26 S. W. 729, 731.

⁵ *Wilkinson v. Stuart*, 74 Ala. 198, 203; *Marshall v. Marshall*, 86 Ala. 383, 388.

⁶ *Sellers v. Friedman*, 14 So. (Ala.) 277, overruling *McQueen v. Turner*, 91 Ala. 273, 275, so far as this case held that

the denial of jurisdiction in probate courts to partition lands adversely claimed is not applicable to the chancery court. To similar effect, *Stansbury v. Inglehart*, 20 D. C. 134, 146.

⁷ "It is well settled," says Somerville, J., "that this jurisdiction, of which the statute is merely declaratory, will be exercised by a court of equity on its own established principles, and with the use of its own better adapted and more flexible modes of procedure, unembarrassed by the procrustean rules which cram the statutory jurisdiction of courts of law:" *Donnor v. Quartermas*, 90 Ala. 164, 170.

of the settlement of estates of deceased persons, for the purpose of distribution to the heirs or devisees of such estates, confers no jurisdiction on such courts over the interests of any persons who might be owners in common with the estate or its distributees, and who did not deraign their title through the estate.¹ The Probate Court may also be prohibited from making partition when the shares or proportions of the respective parties are in dispute between them, or appear to the court to be uncertain by reason of depending upon the construction or effect of a devise or conveyance, or other questions that the court deems proper for the consideration of a court of common law and jury;² but it must, to deprive the Probate Court of jurisdiction on this ground, appear that there is a real doubt and uncertainty in relation to the legal rights of the parties.³

No jurisdiction if property is in possession of an adverse claimant.

The rule is established that in the absence of statutory provisions authorizing it, partition cannot be awarded during the existence of the life estate, of an estate in reversion or remainder, either in law or in equity;⁴ nor, as a general rule, will partition be awarded of part only of an entire estate.⁵ But this doctrine is held inapplicable, to a case in chancery, where, though the title was derived from a single conveyance, yet title to the several tracts of land in immediate possession was essentially distinct and different from the title of the reversioner.⁶ As a general rule the owner of a life estate in an undivided part of land may have partition of the property, or sale and division of the proceeds,⁷ although there be future contingent interests of persons not *in esse*.⁸ But a tenant for life

Nor between parties not holding in common.

¹ Richardson v. Loupe, 80 Cal. 490, 496; Buckley v. Superior Court, 36 P. 360; Snyder's Appeal, *supra*; to same effect: Buddecke v. Buddecke, 31 La. An. 572, 573; Crawford v. Binion, 46 La. An. 1261.

² Marsh v. French, 159 Mass. 469, 471.

³ Not a mere assertion by one of the parties that there is a dispute or controversy: Dearborn v. Preston, 7 Allen, 192; Marsh v. French *supra*.

⁴ Wilkinson v. Stuart, 74 Ala. 198, 205; Schori v. Stevens, 62 Ind. 441, 445; Coon v. Bean, 69 Ind. 474; Merritt v. Hughes, 36 W. Va. 356, 359, citing numerous au-

thorities; Striker v. Mott, 28 N. Y. 82, 90; Rhorer v. Brockhage, 13 Mo. App. 397, 406.

⁵ Wilkinson v. Stuart, *supra*; Gore v. Dickinson, 98 Ala. 363, 370.

⁶ Wilkinson v. Stuart, *supra*.

⁷ Shaw v. Beers, 84 Ind. 528, citing earlier Indiana cases; McQueen v. Turner, *supra*, holding that the court may require the party to give bond and security for the protection of the remainder-men; Mead v. Mitchell, 17 N. Y. 210.

⁸ On the principle that in actions affecting the title to land it is sufficient to bring before the court the person entitled

entitled to and in the enjoyment of the sole and exclusive possession, has no standing to maintain an action of partition against remainder-men having a vested estate in fee simple;¹ all the parties, including infants, are, however, bound by a final judgment confirming a sale made in such case, because the defect is not jurisdictional, the judgment, though erroneous, is not absolutely void, but may be corrected on appeal.² The purchaser at a sale under such an order, with notice of the outstanding claims of remainder-men not made parties, will be compelled to complete his purchase.³ If the infant defendants are in any way prejudiced or injured by the omission of the guardian to make the proper defence, their remedy will be against him and his sureties.⁴ Partition may be had between owners in common of the fee, notwithstanding the existence of a lease of the whole or a part of the estate,⁵ but the sale must be made subject to the rights of the lessees, who thereby become the tenants of the purchaser.⁶ That some of the owners in common have executed conveyances to portions of the property, since the devolution of title on them,⁷ or that adverse possessions have arisen (if not for a sufficient length of time to perfect the statutory bar of limitation),⁸ cannot deprive owners in common of their right to demand partition.

As the real estate of decedents descends to their heirs or devisees subject to be sold for the payment of debts if there is not sufficient personalty in the estate for that purpose, it is evident that the rights of creditors are paramount to those of the heirs or devisees; hence, in

No partition
before pay-
ment of ances-
tor's debts,

to the first estate of inheritance, omitting those who might claim in remainder or reversion after such vested estate of inheritance; a decree against the person having the first estate would bind those in remainder or reversion, although the estate might afterward vest in possession: *Mead v. Mitchell*, *supra*, 17 N. Y. 210, 214, approved in *Clemens v. Clemens*, 37 N. Y. 59, 70, and later New York cases; *Reinders v. Koppelman*, 68 Mo. 482, 501; *Preston v. Brant*, 96 Mo. 552, 559.

¹ *Seiders v. Giles*, 141 Pa. St. 93. Nor is such life-tenant affected by partition decree affecting remainder-men: *Smalley v. Isaacson*, 40 Minn. 450.

² *Cromwell v. Hull*, 97 N. Y. 209, 211; *Blakely v. Calder*, 15 N. Y. 617, 621.

³ *Cromwell v. Hull*, *supra*; *Reed v. Reed*, 46 Hun, 212. But see *James v. Meyer*, 41 La. An. 1100, 1104.

⁴ *Reed v. Reed*, *supra*.

⁵ *Willard v. Willard*, 145 U. S. 116, 121; *Hunt v. Hazelton*, 5 N. H. 216; *Phillips v. Johnson*, 14 B. Mon. 172, 174; *Cook v. Webb*, 19 Minn. 167, 170; *Haussler v. Missouri Iron Co.*, 110 Mo. 188, 192.

⁶ *Woodworth v. Campbell*, 5 Paige, 518. But see *Cannon v. Lomax*, 29 S. C. 369, holding that partition cannot be had while two of the tenants in common hold an unexpired lease of the whole property.

⁷ *Gore v. Dickinson*, 98 Ala. 363, 368.

⁸ *Gore v. Dickinson*, *supra*.

many States, there can be no partition until the estate, as to the debts against it, and legacies are found, on adjudication, to be fully settled.¹ But though the action be brought prematurely, if at the time the decree is rendered it is manifest that the estate has been practically settled, and that no part of the land would be required for the payment of debts, the partition will not be disturbed ;² unless it is determined, however, that the personalty is sufficient to pay all debts of the decedent, there can be no decree, even though the parties give bond to pay all demands against the estate, if the statute make no provision for such bond.³ In New Jersey it is held that where partition is decreed within the time allowed creditors to present their demands for allowance, the purchaser takes at his risk, subject to such claim, but the partition is otherwise valid.⁴ The same purpose is contemplated in other States by a provision prohibiting partition until proof be made that all the debts have been paid, or secured to be paid, or that there is sufficient personal property of the estate to pay all debts,⁵ or that the debts have been provided for.⁶

It is held, that there can be no partition of the homestead of minor children during their minority,⁷ or during the occupancy by the widow ;⁸ and that partition should not be allowed against the direction of a testator,⁹ nor against minors, where the testator authorized a trustee to sell the lands and invest the proceeds under the will, unless the interest of the minors clearly demands it.¹⁰

Where a decedent died leaving lands in several counties, partition can be had only in the court of the county in which the

¹ So the law will not permit the vain thing to be done of partitioning lands when it cannot be determined what interest the heirs have in them, nor just what lands are subject to partition : *Thomas v. Thomas*, 73 Iowa, 657, 660. See also *Alexander v. Alexander*, 26 Neb. 68, 73 ; *Matthews v. Matthews*, 1 Edw. Ch. 565, 568 ; *Duncan v. Henry*, 125 Ind. 10.

² *Snyder v. Snyder*, 75 Iowa, 255, 258 ; *Hendry v. Hollingdrake*, 16 R. I. 477 ; *Spring v. Sandford*, 7 Paige, 550, 553.

³ *Clarity v. Sheridan*, 59 N. W. (Iowa) 52, 54.

⁴ *Simpson v. Straughen*, 19 A. (N. J. Ch. Ct.) 667.

⁵ *Swihart v. Swihart*, 7 Oh. Ct. Ct. R. 338, 340.

⁶ *Williams v. Mallory*, 33 S. C. 601.

⁷ *Rhorer v. Brockhage*, 13 Mo. App. 397, 400 ; *Trotter v. Trotter*, 31 Ark. 145, 150 ; *Hoppe v. Hoppe*, 36 P. (Cal.) 389, 393.

⁸ *Nicholas v. Parcell*, 21 Iowa, 265 ; *McDougal v. Bradford*, 80 Tex. 558, 567.

⁹ *Outcalt v. Appleby*, 36 N. J. Eq. 73, 82 ; *Gerard v. Buckley*, 137 Mass. 475, 478.

¹⁰ *Tomkins v. Miller*, 27 A. (N. J.) 484

unless proof of sufficient personalty be made.

No partition of homestead ; nor against testator's direction.

Partition of
property in
several coun-
ties.

deceased had his domicil at the time of his death, because creditors must there prove their claims against the estate; but there may be statutory authority to proceed in the county where the land lies, with the consent of the Orphan's Court of the county of the domicil.¹ The court having jurisdiction of the partition will appoint the executor or administrator of the estate of the decedent whose real estate is to be sold, if there be such, to execute the order of sale,² and has jurisdiction to enforce an owelty against one who has purchased at sheriff's sale the share of the indebted heir.³

Where the statute authorizes suit for partition to be brought in behalf of minors, they appear by their statutory guardians, and

Minors are
represented by
guardians.

no defence need be made for them;⁴ and where they are defendants, they appear by guardian *ad litem*, appointed for them after service of summons upon themselves, in person, and upon the respective fathers, mothers, guardians, etc., as may be prescribed by statute;⁵ or by tutors or curators *ad hoc*.⁶ If no guardian, special tutor or curator legally appointed appear for infant defendants in partition proceedings, their title to the property is not divested by the decree or judgment that may be rendered;⁷ and where infants having an interest in the land are not made parties, the proceedings will be reversed on appeal so that service may be had on the infants.⁸

Although the jurisdiction of controversies as to advancements be conferred on the Probate Court, yet if jurisdiction has attached in the Chancery Court under a bill for the partition of
Adjusting
advancements. lands among the children of a decedent, the court may, before decreeing partition, require the parties to account for their advancements, taking the same as part of their respective shares.⁹ So where the partition proceeding is an ordinary action,

¹ As in Pennsylvania: *White's Estate*, 14 Pa. Co. Court R. 138; Louisiana: *Crawford v. Binion*, 46 La. An. 1261, 1263.

² *Arble's Estate*, 161 Pa. St. 373.

³ *In re Donaldson*, Am. Dig. for 1893, 3766.

⁴ *Power v. Power*, 15 S. W. 523; *Henning v. Barringer*, 10 S. W. (Ky.) 136.

⁵ *Tederall v. Bouknight*, 25 S. C. 275, 281, with a citation of earlier South Carolina cases on p. 283. See, as to the service necessary on lunatics, *Finzer v. Nevin*, 18 S. W. 367.

⁶ *Covas v. Bertonlin*, 44 La. An. 683, 688.

⁷ *James v. Meyer*, 41 La. An. 1100, 1104.

⁸ *Kentucky Union Land Co. v. Elliott*, 15 S. W. 518. It is held in this case, that there need be no new division of the lands, if the one made is adopted by the guardian, after service of process, as equal and just to the wards.

⁹ *Marshall v. Marshall*, 86 Ala. 383, 387; *Pigg v. Carroll*, 89 Ill. 205, 207.

the Circuit Court may hear and determine as a defence to such an action the question of advancements by the ancestor's executrix, under an agreement that they should be so charged.¹

§ 93. **Sale of Real Estate of Minors by Foreign Guardians.** — From the principle limiting the authority of guardians to the territorial jurisdiction of the sovereignty granting the same, it follows that they have no authority as such over the person or property of their wards in other States, except such as they derive from the law of the State in which such property is situated;² and such foreign guardian cannot, by virtue of his appointment in the foreign State, give jurisdiction to the court of the place where his ward's real estate is situated, for the partition of the same.³ A spirit of comity between the States has resulted in the enactment of laws in most of them enabling foreign guardians to sell the real estate of non-resident infants without the expense and inconvenience of ancillary guardianship in the State where such property may be situated. The conditions upon which such authority is granted are, in most instances, tender of authentic proof that the applicant has been duly appointed guardian of the owner of the land sought to be sold, and that he has given bond sufficient to protect the interests of the ward in the State of the domicil, or, if not, then to give the bond in the court having jurisdiction to make the order.

To confer jurisdiction upon the Probate Court of any county in which the minor's land may be situated, it is sufficient for the applicant to file a petition praying for the license to sell, after giving the notice required for such application; and on the hearing it is incumbent upon the petitioner to show that he is the duly appointed guardian in the State of the minor's domicil and that he has filed an authenticated copy of such appointment. The court must pass upon these facts; and a wrong decision, or a decision on incompetent or insufficient evidence, is error to be corrected on appeal, but does not affect the jurisdiction, which depends not upon the validity of the appointment in the State of the domicil, but upon compliance with the law of the forum where the property is.⁴ The burden of

Foreign guardians have no power to sell lands,

except as authorized by *lex loci rei sitæ*.

Validity of foreign appointment not collaterally assailable.

¹ *Green v. Walker*, 99 Mo. 68, 73.

² *Ante*, § 28; *Musson v. Fall Back*, 12 S. (Miss.) 587; also 589.

³ *Rogers v. McLean*, 31 Barb. 304.

⁴ *Menage v. Jones*, 40 Minn. 254, 256.

See *James v. Meyer*, 43 La. An. 38; *Myers v. McGavock*, 58 N. W. (Neb.) 522, 525.

proving the invalidity of the foreign appointment rests upon the party who attacks the sale on that ground.¹ A foreign guardian authorized by a court of competent jurisdiction to sell his ward's real estate for partition, is not required to execute, before the sale is ordered, the bond required of guardians in other cases of sale of a minor's real estate.² In Tennessee the foreign guardian, having sold his ward's real estate, must give bond in the court having control of the funds arising therefrom, before he can receive them.³ So in Maine, where the Probate Court of the county in which a non-resident minor's real estate lies may, on the petition of the foreign guardian, appoint a suitable person to sell the same, who is required to give bond; and it is a breach of such bond that the principal therein, although he placed the proceeds of the sale on interest for the benefit of the minor, and took security for the same in his own name, yet refuses to deliver over the same to the foreign guardian, or pay the amount of it, after being cited into the Probate Court for such purpose.⁴ It was held, in a well-considered case in Nebraska, that the sale of a minor's real estate by his foreign guardian will not be held void, in a collateral proceeding, on any or all of the following grounds:—

1. Because the wards resided, at the time the application was made for the sale of their property, in a State other than that in which the guardian had been appointed, it appearing that at the time of the appointment they were domiciled in the latter State;

2. Because after the appointment of the foreign guardian in the State of their domicil his wards took up their residence in another State;

3. Because of any informality in the proof made, in the court ordering the sale, of the appointment of the foreign guardian;

4. Because the petition for license to sell was not verified by the guardian;

5. Because the petition for license to sell was verified by the guardian's attorney who conducted the proceedings;

6. Because the bond given by the guardian to the court on ordering the sale was not formally approved;

7. Because the record contained no copy of a notice of the sale

¹ Farrington v. Wilson, 29 Wis. 383, 397.

² Shelby v. Harrison, 84 Ky. 144.

³ McClelland v. McClelland, 7 Baxter, 210.

⁴ Johnson v. Avery, 11 Me. 99.

required by the statute, the court in approving the sale having found that the proceedings had been in all respects regular and in conformity to law ;

8. Because the sale was not made by the guardian personally, but through his attorney ;

9. Because the description of the property sold was ambiguous and indefinite, if sufficient to enable the property to be identified.

TITLE FOURTH.

OF THE GUARDIAN'S ACCOUNTING.

CHAPTER XII.

OF INTERMEDIATE OR PERIODICAL ACCOUNTING.

§ 94. **General Liability of Guardians to Account.** — In England guardians in socage were amenable to an action at law for an accounting, at any time after the heir had reached the age of fourteen complete,¹ but the more usual and convenient method of obtaining an account of the guardian's management of his estate, is by bill in equity, which may be filed during his infancy, or on his coming of age.² Guardians, like receivers, are bound by their recognizance to account regularly, or when called on, and are considered officers of the court, which is not the case of executors.³ Though the infant himself, says Lord Macclesfield, cannot bring an action against the guardian, until his coming of age, yet a third person may bring a bill for an account against the guardian, even during the minority of an infant.⁴

So in America,⁵ in the absence of statutory provision to the contrary, every guardian, whether appointed by a chancery or any other court, or acting upon any other authority, is responsible in chancery for his conduct as

¹ Macph. on Inf. *38; *Field v. Torrey*, 7 Vt. 372, 388, approved in *Harris v. Harris*, 44 Vt. 320, 323.

² *Chandler v. Villett*, 2 Saund. 120, as cited in *Gage v. Bulkely*, *Ridgeway's R. t. Hardw.* 263, 284.

³ In the Matter of *Burke*, 1 Ball & B. 74.

⁴ *Eyre v. Shaftsbury*, 2 P. Wms. 103, 119; *McKay v. McKay*, 33 W. Va. 724; *Peck v. Braman*, 2 Blackf. 141; *Sledge v. Boon*, 57 Miss. 222.

⁵ As to chancery jurisdiction over minors and persons of unsound mind, see *ante*, § 2; in respect of sale of a minor's real estate, § 68.

such.¹ Probate courts have no power to call guardians to account, save as may be specified by statute.² Hence, a guardian, holding the proceeds of his wife's real estate, cannot be compelled by the surrogate, in a proceeding for an accounting on behalf of his ward (the offspring of his marriage with said wife), to account for the fund, because he holds it as tenant by the curtesy.³ Nor could the County Court entertain a bill to surcharge and falsify a settlement after settlement made by and resignation of the guardian; resort must be had, in such case, to chancery.⁴ And where, for any reason, the Probate Court is without adequate power to deal with the liability of a guardian to his ward, or to such as were his wards, a court of equity is the proper tribunal to compel accounting by such guardians, their sureties or representatives.⁵ There have been decisions, in some of the States, holding that where a guardian, after his ward attains full age, and before the accounts of his receipts and payments during the ward's minority are settled, continues to manage the property at the request of his ward, it is, in effect, a continuance of the guardianship, and the guardian must state and settle the entire account, embracing transactions after as well as during the minority, in a tribunal having jurisdiction of the guardianship; and that, in such case, the Orphan's Court has jurisdiction of the whole account;⁶ but the general rule is that the probate court has no jurisdiction of what occurs after the ward's majority.⁷

or in probate courts by statutes,

but not beyond the statutory limitation.

If powers of Probate Court are inadequate, equity has jurisdiction.

So one who acts as guardian without authority, or under an appointment void for want of jurisdiction in the court having granted it, becomes liable as a trustee *in invitum*, and may be made to account in a court of equity,⁸ or, under some circum-

¹ *In re Andrews*, 1 Johns. Ch. 99; *Monell v. Monell*, 5 Johns. Ch. 283, 297; *Lemon v. Hansbarger*, 6 Gratt. 301; *Pace v. Pace*, 19 Fla. 438, 454; *Barnes v. Compton's Adm'r*, 8 Gill, 391, 397; *Thomas v. Williams*, 9 Fla. 289, 298; *Crain v. Ferguson*, 1 Md. Ch. 151, 153.

² *In re Dyer*, 5 Paige, 534, 536; *Farnsworth v. Oliphant*, 19 Barb. 30, 35.

³ *In re Camp*, 126 N. Y. 377, 389.

⁴ *Roy v. Giles*, 4 Lea, 535.

⁵ *In re Allgier*, 65 Cal. 228; *Peck v. Braman*, 2 Blackf. 141; *Hall v. Cone*, 5

Day, 543, 549; *Davenport v. Olmstead*, 43 Conn. 67, 76; *Commonwealth v. Henshaw*, 2 Bush, 286; *Willis v. Fox*, 25 Wis. 646, 648.

⁶ *Pyatt v. Pyatt*, 46 N. J. Eq. 285, 288 *et seq.*; *Moore v. Hazelton*, 9 Allen, 102, 104.

⁷ See *post*, § 101.

⁸ *Corbitt v. Carroll*, 50 Ala. 315; *Hall v. Hall*, 43 Ala. 488, 505; *Drury v. Conner*, 1 Har. & Gill, 220, 230, citing English authorities; *Chancy v. Smallwood*, 1 Gill, 367, 370; *Hanna v. Spotts*, 5 B. Mon. 362,

stances, in an action of account at law¹ for money had and received.² And where such court has obtained jurisdiction in

Court of
Equity having
obtained juris-
diction retains
it to the end.

a proceeding to set aside, on the ground of fraud, a decree made on final settlement between a guardian and his ward, it may retain jurisdiction of the whole case, not only for the purpose of setting aside the fraudulent settlement and decree, but also of determining the amount due the plaintiff upon an honest accounting.³ So it is held, that where an administrator is also the guardian of infant distributees of the estate, chancery alone has jurisdiction to settle his accounts, though a settlement made by the Probate Court in such case is not absolutely void.⁴

The grant of power to probate courts to compel annual and final settlements, and to render final decrees binding alike on

Jurisdiction in
equity not
affected by
grant of power
to probate
courts.

the guardian and his sureties, without express words excluding the jurisdiction of chancery courts as it originally existed, does not affect such jurisdiction;⁵ in such case the jurisdiction is concurrent in both.⁶

So, *a fortiori*, where the statute giving jurisdiction for the settlement of the estates of minors to probate courts expressly saves to circuit courts in chancery their concurrent, original jurisdiction over the same matters, a proceeding in equity for an accounting is eminently proper, if in an action at law it does not appear whether plaintiff's claim is not subject to an equitable defence.⁷

It is held in Georgia that a court of equity of the county in which letters of guardianship were granted has no jurisdic-

Jurisdiction
limited to
county in
which guardian
resides.

tion to call the guardian to account on behalf of the ward, if the guardian resides in another county, no substantial relief being prayed against any other defendant; and that while he may waive the want of jurisdiction so as to bind himself, he can make no waiver that will affect his creditors.⁸

365; *Lehmann v. Rothbarth*, 111 Ill. 185, 195; *Davis v. Harkness*, 6 Ill. 173, 179.

¹ *Field v. Torrey*, 7 Vt. 372, 386.

² *Pickering v. De Rochement*, 45 N. H. 67.

³ *Douglass v. Ferris*, 138 N. Y. 192, 201, citing earlier New York cases.

⁴ *Bruce v. Strickland*, 47 Ala. 192, 199, relying on *Hays v. Cockrell*, 41 Ala.

75, 80, and *Carswell v. Spencer*, 44 Ala. 204, 206.

⁵ *Lee v. Lee*, 55 Ala. 590, 595; *Bond v. Lockwood*, 33 Ill. 212; *Salter v. Williamson*, 2 N. J. Eq. 480, 489.

⁶ *Hailey v. Boyd*, 64 Ala. 399, 401; *Fulgham v. Herstein*, 74 Ala. 496; *People v. Barton*, 16 Col. 75, 79.

⁷ *Tudhope v. Potts*, 91 Mich. 490.

⁸ *Bass v. Wolff*, 88 Ga. 427.

The accounting by a guardian in the Probate Court has been held to be an equitable and not a legal proceeding, involving not merely the ordinary items of debit and credit, but also considerations as to the propriety of charges and investments, and as to the allowance of compensation with which a jury cannot meddle;¹ and that a guardian's liability for the funds of his ward can seldom be passed on by a jury.²

Accounting in Probate Court held an equitable proceeding.

The pending of proceedings in the Orphan's Court for the final settlement of a guardian's account, constitutes a bar to a bill in equity against the guardian, for discovery and accounting.³ In Minnesota, whose constitution provides that probate courts "shall have jurisdiction over the estates of deceased persons, and persons under guardianship, but no other jurisdiction except as prescribed by this constitution," it is held that jurisdiction over persons under guardianship embraces jurisdiction over their affairs in general, including the management and disposition of their property, and hence probate courts have jurisdiction to settle the accounts of guardians of minors after the ward is of age.⁴

Proceeding in Orphan's Court bar to bill in equity.

Guardianship over person includes guardianship over the estate.

That an action at law cannot be brought for a guardian's liability, either against the guardian or his sureties, until there has been an accounting in the court having original jurisdiction over guardians' accounts, has been stated in a former chapter;⁵ and that this jurisdiction is vested in courts having probate jurisdiction, is held in Arkansas,⁶ Iowa,⁷ Maine,⁸ Nebraska,⁹ New Hampshire,¹⁰ Ohio,¹¹ South Carolina,¹² Vermont,¹³ Wisconsin,¹⁴ and, it seems, in New York¹⁵ and probably other States. It is held, also, that where the guar-

States in which probate courts have jurisdiction over guardians' accounts.

¹ *Gott v. Culp*, 45 Mich. 265, 275. The powers of the Probate Court, in such case, are coextensive with those of a court of chancery, possessing similar jurisdiction, and adopting the same forms and modes of procedure: *Cheney v. Roodhouse*, 135 Ill. 257, 262.

² *Chubb v. Bradley*, 58 Mich. 268, 272.

³ *Rau v. Small*, 144 Pa. St. 304.

⁴ *Jacobs v. Fouse*, 23 Minn. 51.

⁵ *Ante*, § 46.

⁶ *Connelly v. Weatherly*, 33 Ark. 658, 662.

⁷ *Gillespie v. See*, 72 Iowa, 345.

⁸ *Bailey v. Rogers*, 1 Me. 186, 195; *McFadden v. Hewett*, 78 Me. 24, 27.

⁹ *Ball v. La Clair*, 17 Neb. 39, 41; *Bisbee v. Gleason*, 21 Neb. 534, 538.

¹⁰ *Critchett v. Hall*, 56 N. H. 324.

¹¹ *Newton v. Hammond*, 38 Oh. St. 430, 435.

¹² *Anderson v. Maddox*, 3 McCord, 237.

¹³ *Probate Court v. Slason*, 23 Vt. 306.

¹⁴ *Kugler v. Prien*, 62 Wis. 248.

¹⁵ *Perkins v. Stimmel*, 114 N. Y. 359, 365, 370.

dian's bond obligates him to settle his accounts in the Probate Court on the expiration of his trust, the failure to make such settlement is a breach of the bond, authorizing the ward to bring suit thereon against the sureties without having a *devastavit* previously established against the principal.¹

In most States the Probate Court has power to compel a guardian, whose authority has ceased, to account for his management of the trust, showing what he has done, and what he has or ought to have in hand belonging to the ward.² Where the guardian is dead, the power of the Probate Court to compel final

accounting extends over the representatives of the deceased guardian.³ It is no defence to an action in such case that

the guardian settled with his ward and took her discharge of all matters in his hands as guardian, unless

such settlement was made in court on proper citation, and approved by the judge.⁴ Statutes, in some instances, provide

summary remedies against guardians who fail to make final accounting. Besides being liable to citation, attachment, and imprisonment,⁵ it is provided in

Alabama, that the court may state the account for the recalcitrant guardian, and give him notice for three weeks; and if he do not appear within that time and account, any person in interest may contest the court's account, and the court must try the contest, and decree on the account whether contested or not.⁶ In Florida any person acting for a ward may compel the guardian to account with his ward by a bill in chancery.⁷

It is held that under a statute authorizing a court to remove guardians on the complaint of any person in behalf of a minor, and to make all orders necessary in the premises to

¹ *People v. Brooks*, 22 Ill. App. 594, 596.

² *Price v. Peterson*, 38 Ark. 494; *Pierce v. Irish*, 31 Me. 254, 260; *Stinson v. Leary*, 69 Wis. 269.

But in Kansas the Probate Court has no power to compel guardians to make final settlements; annual settlements may be required during the minority of the ward and the lifetime of the guardian; but where the guardian dies before making final settlement, and after the ward's majority, his executors, having received

no assets of the ward, cannot be compelled to make a settlement of the ward's estate: *Harris v. Calvert*, 44 Pac. (Kans.) 25.

³ *Woodbury v. Hammond*, 54 Me. 332, 343.

⁴ *Wing v. Rowe*, 69 Me. 282; *Wade v. Lobdell*, 4 Cush. 510.

⁵ In Alabama, for instance, not exceeding six months: Code, 1887, § 2472.

⁶ Code, 1887, §§ 2474 *et seq.*

⁷ Rev. St. 1892, § 2103.

compel the guardian to account, such court may issue its writ *ne exeat Republica*, if necessary to protect the rights of the minor,¹ and that an arrest and detention under such writ, to prevent a person from going out of the State until he shall give security for his appearance is not obnoxious to the constitutional inhibition against imprisonment for debt.²

Writ of *Ne exeat Republica* may issue against a guardian.

§ 95. *Inventories.* — The subject of accounting by guardians is regulated by statutes in all the States of the Union. A preliminary requirement is, in most cases, the return of an inventory to the court having jurisdiction of the guardian, which ought to constitute the basis of all subsequent accountings and settlements. It should be returned within a certain time fixed by the statute, in most instances, at three months after the date of letters, or appointment; but in Wyoming,³ at twenty days; in Florida,⁴ Kansas,⁵ Pennsylvania,⁶ and Texas,⁷ at thirty days; in Iowa,⁸ and Washington,⁹ forty days; in Illinois¹⁰ and Kentucky,¹¹ sixty days; in Missouri,¹² at the first term after any property comes into their hands; in Tennessee, at the first term after appointment,¹³ and in Virginia,¹⁴ within four months after the appointment of the guardian, or four months after any property is received by him. The requirement of additional inventories in case property belonging to the wards is found or acquired subsequently to the filing of the original inventory, is common to most of the statutes; in many instances annual, and in some, if the estate exceeds a certain amount in value, semi-annual inventories are directed to be filed.¹⁵ The rule of court requiring inventories to be filed, is to be strictly enforced.¹⁶ Various penalties are enacted against guardians who fail to comply with the statute in this respect. In Connecticut, the guardian forfeits

Inventory the basis of subsequent accounting.

Additional inventories.

Penalties for failing to return.

¹ *People v. Barton*, 16 Colo. 75, 78; *McNamarra v. Dwyer*, 7 Paige, 239.

² *People v. Barton*, *supra*, relying on *Dean v. Smith*, 23 Wis. 483, 486; *Adams v. Whitcomb*, 46 Vt. 708.

³ Rev. St. 1887, § 2256.

⁴ Rev. St. 1892, § 2093.

⁵ Gen. St. 1889, § 3224.

⁶ Bright. *Purd. Dig.* 1883, p. 515, § 45.

⁷ *Sayler's Civ. St.* 1888, Art. 2531.

⁸ *McClain's Ann. Code*, 1888, § 3439.

⁹ *Hill's Code Pr.* 1891, § 1160.

¹⁰ St. & Curt. Ann. St. 1896, ch. 64, ¶ 13.

¹¹ St. 1894, § 2027.

¹² Rev. St. 1889, § 5300.

¹³ Code, 1884, § 3398.

¹⁴ Code, 1887, § 2673.

¹⁵ In Arizona, if the estate exceed \$100,000: Rev. St. 1887, § 1346. So in California: *Deering's Code Civ. Pr.* 1885, § 1773; in Montana, if estate exceed \$20,000: *Prob. Pr. Act*, 1888, § 372. And so in Utah: *Comp. L.* 1888, § 4327.

¹⁶ *In re Seaman*, 2 Paige, 409, 410.

a penalty of twenty dollars for each month after the expiration of the first two months, until the time when he returns the inventory.¹ The omission to file the inventory is generally followed by citation, and if this be unavailing, by attachment, fine, and imprisonment until the guardian comply with the statute; or by the revocation of his authority;² and in some States by the forfeiture of the guardian's commissions. The violation of the statute

Breach of the bond. is also designated as a breach of the bond, and authorizes suit to be brought thereon,³ and the removal of

the guardian.⁴ In Wisconsin there seems to be no affirmative statutory requirement to file an inventory, except as a condition in the bond to be given by the guardian;⁵ but such a provision is held to confer jurisdiction on the court to require the guardian to comply with the condition.⁶ The statute requiring guardians to file inventories is operative upon all guardians, though appointed and sworn before the passage of the statute, and when the law did not require the making of an inventory;⁷ and extends to successors of guardians having resigned, and who had complied with the law, as fully as if there had been no previous guardian.⁸

Inventories are required to be made under oath of the guardian, and generally to be attested by two or more disinterested persons,

Under oath. appointed by the court to aid the guardian in making the inventory.⁹ They must contain a full list of all
Contain full list of all ward's property. the real estate and of all the goods and chattels, rights and credits of the ward that comes to the pos-

session or knowledge of the guardian;¹⁰ in some instances, it is also required to show the value of real estate, its rental, whether encumbered, and if so, how; the amount of money, list of personal property, including annuities and credits, and to state

¹ Gen. St. 1888, § 466.

² In a proceeding to remove a guardian for failure to file an inventory as required by statute, evidence that no inventory was found by the clerk among the papers, and that it was not his habit to make a record of the filing of such inventories, was held sufficient, in the absence of affirmative evidence of such filing, to authorize the removal: *Kimmel v. Kimmel*, 48 Ind. 203.

³ *Fuller v. Wing*, 17 Me. 222, 224.

⁴ *Young v. Young*, 5 Ind. 513; *Barnes v. Powers*, 12 Ind. 341.

⁵ *Sanborn & Berryman's St.* 1889, § 3966, ¶ 1.

⁶ *Peel v. McCarthy*, 38 Minn. 451, 453.

⁷ *Markel v. Phillips*, 5 Ind. 510.

⁸ *Wood v. Black*, 84 Ind. 279, 282.

⁹ But in Connecticut, a paper filed in the clerk's office, containing a list of sundry articles of personal property, not signed by the overseer, and having no authentication on its face, was held to be "a true and perfect inventory" in compliance with the statute: *Clark v. Whitacre*, 18 Conn. 543, 550.

¹⁰ *Rev. St. of Mo.* 1889, § 5300.

whether they are "good," "doubtful," or "desperate."¹ But while such inventories are *prima facie* proof that the guardian has received the property therein described, and may be given in evidence against him and the sureties on his bond,² yet neither he³ nor his sureties⁴ are precluded by the inventory from showing the true amount of property for which he is liable. But where a guardian receives a conveyance of the estate of his ward in his own name, and includes it in the inventory as his ward's property, charging the ward's estate with the expense of its management and accounting for the proceeds, he will be presumed to hold it as trustee for the ward.⁵ In some of the States the statute expressly authorizes the inventory to be corrected; and it is held that where a guardian in inventorying his ward's assets in good faith, was afterwards compelled to deliver them to the true owner, the Probate Court may, on proper proof to that effect, permit him to correct his inventory.⁶

Prima facie
evidence of
property listed,

but not con-
clusive.

Guardian may
correct
inventory.

Most of the statutes prescribe, also, that the chattels listed in the original inventory be appraised by two or more discreet persons, in the manner pointed out for the appraisement of the assets in the hands of executors or administrators; as well as the property that may come into the guardian's hands subsequently to the first appraisement.

Appraisement.

§ 96. **Intermediate Accounting under American Statutes.** — Regular *annual* or other *periodical* accounts are required in the several States, under their statutes, from guardians of minors and other persons under guardianship; not so much for the purpose of adjudicating the respective rights and liabilities between the guardian and ward (which is not accomplished until *final* settlement of the guardian's account) as to compel the guardian to furnish evidence to the court and to the public as to the condition of the estate, its liabilities and resources, the propriety of orders touching investments of the funds, the sufficiency of the bond, the necessity of selling personal or real estate, and like matters of valuable information touching the safety of the trust estate. To

Intermediate
accounting,
as evidence of
conditions of
estate;

¹ For instance, in Illinois: St. & Curt. St. 1896, ch. 64, ¶ 13.

² *State v. Stewart*, 36 Miss. 652, 656; *Green v. Johnson*, 3 Gill & J. 389, 392.

³ *State v. Stewart*, *supra*.

⁴ *Sanders v. Forgasson*, 3 Baxt. 249, 258.

⁵ *Fogler v. Buck*, 66 Me. 205.

⁶ *Martin v. Sheridan*, 46 Mich. 93.

at specified times; this end the accountings must be made at specified times, without waiting for the ward or his friends to apply to the court for an order to compel them. The first of these accountings (designated, also, in some of the States, as reports, returns, or settlements) is usually due at the end of the usually every first year after appointment, and at the corresponding year; term of the court every year thereafter, and at such other times as the court may require by order. In some of the States, however, accounting is directed to be made at least once every three years, as, for instance, in Alabama,¹ Illinois,² Maine,³ and Pennsylvania,⁴ and as often as the court may require it. Accounting is required in Delaware⁵ not oftener than once in two years, unless on a special occasion, and in Indiana⁶ at least once in two years; in New Hampshire within three years after appointment and as often thereafter as the court may require.⁷ In Connecticut, annual settlements are dispensed with where the estate is less than five hundred dollars,⁸ and in Tennessee no guardian need be appointed where the estate does not exceed one hundred and fifty dollars.⁹ In Florida there must be accounting by the first day of June next after the expiration of one year from the appointment, and on the first of June every year thereafter;¹⁰ and so in Georgia by the first Monday in July every year.¹¹ The report or account rendered must be under oath.¹²

The contents of these periodical, partial, or intermediate settlements, accounts, returns, or reports, as they are variously designated, are set out with some minuteness in the several statutes. Guardians are required, without waiting for an order to that effect from the court,¹³ to report the amount and nature of all property of the ward, Must show amount and nature of all property of the ward, and application of money. tion of all moneys expended by them for the education and maintenance of their wards, as well as in the pres-

¹ Code, 1887, § 2454.

² St. & Curt. St. 1896, ch. 64, ¶ 14.

³ Rev. St. 1884, ch. 67, § 22.

⁴ Bright. Purd. Dig. 1883, p. 315, § 46.

⁵ Rev. Code, 1874, p. 483, § 3.

⁶ Burn's Rev. 1894, § 2685, ¶ 3.

⁷ Publ. St. N. H. 1891, ch. 177, § 4.

⁸ Conn. G. St. 1887, § 498.

⁹ Tenn. Code, 1884, § 3360. The court is to dispose of the estate in such case.

¹⁰ Sanderson v. Sanderson, 20 Fla. 292, 322.

¹¹ Ga. Code, 1882, § 1814.

¹² In exceptional cases the verification may be by a party other than the guardian, if the guardian will also swear that he believes his statements to be true: *Racouillat v. Requena*, 36 Cal. 651.

¹³ *Prindle v. Holcomb*, 45 Conn. 111, 120.

ervation of their estates, or their management. Where there are several guardians to the same estate, the court may allow the report to be filed on the verification of one or more of them.¹ By a rule of court in Iowa, they are required to be self-explanatory, without reference to any other paper.²

Much stress is laid, in some of the States, on a minute statement of the disposition made by the guardian of the money belonging to his ward, to be made as part of his annual settlements. Thus, in Missouri, the statute directing the manner of investments by guardians³ makes it the duty of the court "to require every guardian and curator to make a report at every annual settlement of the disposition made by such guardian or curator of the money belonging to the ward intrusted to him;" and if it appears that the money has been loaned out, the security taken must be minutely described, with its value, and the court must either find the security adequate, or require the guardian to take additional security or call in the loan within ten days. But if the money has not been loaned out in the manner required by the statute, "the guardian or curator shall state such fact, and the reason, which report *shall be sworn* to, and shall . . . *state*, that such guardian or curator has been unable to make such loan after diligent effort to do so."⁴ So where a statute provides that one of the conditions of the guardian's bond shall be, that he file an inventory, every year, of the amount of property received and invested by him, with a statement of the manner and nature of such investments, this is held to impose upon the Probate Court an obligation to see that the guardian include in his annual returns a statement of "the manner and nature of his investments."⁵ And in the absence of express statutory requirement it would seem to be within the range both of the power and duty of the probate judge to require every guardian within his jurisdiction to set forth in his returns not only the amount of his ward's estate, but how and with whom invested.⁶

Report of investment of money.

¹ So provided by statute, for instance, in California: Deering's Code Civ. Proc. § 1775; Idaho: Rev. St. 1887, § 5795; Maine: Rev. St. 1884, ch. 67, § 24; Massachusetts: Publ. St. 1882, ch. 144, § 11; Michigan: Howell's Ann. St. 1882, § 6339; Montana: Comp. St. 1888, Prob. ch. xiv. § 374; Nevada: Gen. St.

1885, § 597; Oregon: Hill's Ann. L. 1887, § 2910; Utah: Comp. L. 1888, § 4329.

² McClain's Ann. Code, 1888, p. lviii. Rule III.

³ Rev. St. 1889, § 5318.

⁴ See *ante*, § 64, on the subject of investing funds.

⁵ Moore v. Askew, 85 N. C. 199, 201.

⁶ Moore v. Askew, 85 N. C. 199, 202.

As already suggested, the periodical or partial accountings are intended, not as an adjudication of the respective rights of the parties, but to furnish evidence of the condition of the estate and information to the court and to all parties concerned;¹ to accom-

plish which end they must recur at stated periods. Hence, the courts are required to compel their rendition, at such times as may be directed by statute, generally by means of citation, and, if this is disregarded, by attachment, followed by fine or imprisonment, or both; and, if deemed best, the guardian may be removed from office for his negligence. The omission to make settlement at the periods stated in the statute is a breach of the bond, on which action lies,² at least, if the bond so provide, after citation.³ In New Hampshire, a guardian removed for failure to settle his guardianship account shall not again be appointed.⁴ In Maryland, where the estate brings less than \$50 a year, no citation is to issue.⁵ In several States the amount of fine that may be imposed for failure to render annual accounts is fixed by statute.⁶ In a number of the States the statute directs forfeiture of all compensation to the guardian if he neglect to make regular settlement.⁷

Where one guardian has been appointed for several wards, though heirs of the same ancestor, or legatees of the same testator, the guardian should file separate accounts for each of the several wards.⁸ It is so provided by statute in Mississippi.⁹ Nor can an administrator, who is also guardian of an heir of the intestate, be allowed to blend the two characters, so as to throw the two estates into a hotch-pot confusion, and thereby sustain a misapplication of the funds and interests of one to the other.¹⁰

Periodical accounting must be coerced by court.

Accounting separate for each ward.

Administrator and guardian in same person must keep separate accounts.

¹ Wall's Appeal, 104 Pa. St. 14, 18.

² Black v. Kaiser, 91 Ky. 422, 425.

³ Bailey v. Rogers, 1 Me. 186, 193.

⁴ Publ. St. 1891, ch. 177, § 4.

⁵ Publ. Gen. L. 1888, Art. 93, § 181.

⁶ Not exceeding \$300 in Colorado, and \$500 in Virginia; not less than \$50 in Rhode Island, and a like minimum in Virginia; in Missouri not exceeding \$100.

⁷ For instance, in Georgia: Code, 1882, § 1827. So in Indiana, where in addition to the forfeiture of compensation the negligent guardian is liable for damages in the sum of ten per centum on the whole

estate. See also *post*, § 106, on the subject of guardians' compensation.

⁸ Connelly v. Weatherly, 33 Ark. 658; Crow v. Reed, 38 Ark. 482, holding that the Probate Court should, of its own motion, strike out a consolidated account for several wards, and direct the filing of separate accounts for each ward: 485; Foteaux v. Lepage, 6 Iowa, 123, 128; Armstrong v. Walkup, 9 Gratt. 372, 377; State v. Foy, 65 N. C. 265, 273; Wood v. Black, 84 Ind. 279.

⁹ Ann. Code, 1892, § 2194.

¹⁰ Stillman v. Young, 16 Ill. 318, 327; Foteaux v. Lepage, 6 Iowa, 123, 128.

§ 97. **Effect of Intermediate Accounting.** — In Alabama, partial settlements of guardians, made in accordance with the statutory requirements, and allowed by the court, are, on final settlement, “presumed to be correct, but may be impeached for fraud, or for any arithmetical or other error;”¹ and such accounting is not *res judicata* in the sense of preventing either party from showing errors therein, or to estop the court from examining the debits and credits on both sides, from the commencement of the guardianship, and rendering such a decree as will be proper upon a view of all the facts.² So it is held in Pennsylvania, that under a statute requiring that “all accounts presented to the Orphan’s Court, . . . if not excepted to, shall, after due consideration, be affirmed,” and that no appeal shall be allowed unless taken within three years from any definitive sentence of the court, the decree on the confirmation by the Orphan’s Court of an executor’s (there is no distinction in the statute in this respect between executors, administrators, guardians, and trustees) account is conclusive, and the account cannot be re-examined on the coming in of a subsequent settlement.³ But the words “shall be finally settled according to law” in a statute providing for partial accounting by executors and others, are held to mean an accounting with notice to the parties interested, and if these be infants, the appointment of a guardian to represent them; and that an accounting without appointment of such guardian, and notice, cannot be a final settlement according to law, and is not therefore conclusive.⁴ Hence, partial accounts of a guardian during the ward’s minority are not conclusive upon the ward, even though they go through the form of a settlement and confirmation.⁵ In Ohio, under a statute requiring biennial settlements by the guardian in Probate Court, which “shall be final between him and his ward, unless appeal is taken therefrom . . . in the manner provided by law; saving, however, to any such ward the right of opening and re-

In Alabama.

In Pennsylvania.

In Ohio.

¹ Code, 1887, § 2458; *Ashley v. Martin*, 50 Ala. 537, 542. It is to be observed, that in this State the court appoints a day for the auditing and stating of the account, of which notice must be given by advertising or posting for three weeks; and a guardian *ad litem* is appointed for the ward: Code, §§ 2454–2456; *Moore v. Baker*, 39 Ala. 704; *Hutton v. Williams*,

60 Ala. 133, citing earlier Alabama cases. But this principle applies only to settlements made in conformity to law: *Radford v. Morris*, 66 Ala. 283, 286.

² *Cunningham v. Pool*, 9 Ala. 615, 621.

³ *Rhoads’ Appeal*, 39 Pa. St. 186, 189.

⁴ *McGrew’s Appeal*, 14 Serg. & R. 396.

⁵ *Douglas’ Appeal*, 82 Pa. St. 169, 173.

viewing such settlement for fraud or manifest mistake, by petition . . . at any time within two years after said ward shall arrive at age," the guardian's settlement is conclusive, unless appealed from or opened as indicated by the statute,¹ but only in respect of such matters as are adjudicated therein.²

In most of the States the partial, or intermediate, or periodical accountings or settlements, when examined and allowed by the court, have the effect of shifting the burden of proof from the guardian accounting to the ward, or other person assailing the account;³ in other words, these settlements are to be held, *prima facie*, to be correct,⁴ as is in some instances directed by statute,⁵ and can be attacked only by a direct proceeding in the court having control over them.⁶ But to have

Prima facie
correct.

If made in
conformity to
statute.

this effect, the settlements must be made in accordance with the requirements of the statute; otherwise they cannot be regarded as presumptive, much less as conclusive, evidence of the truth of any of the charges therein contained.⁷ The mere filing of an account, without action of the court thereon, concludes no one.⁸ Nor has the approval of an account the effect by implication of curing the illegal acts of the guardian to the prejudice of the minor, where the illegality of such acts was not in issue or not brought to the notice of the court.⁹ So the guardian is liable for assets with which he stands charged, having collected them as agent of an administratrix, but not paid them to her, since he was entitled to them as guardian, although in her accounting the administratrix charged herself as having received them.¹⁰

¹ *Woodmansie v. Woodmansie*, 32 Oh. St. 38; *Braiden v. Mercer*, 44 Oh. St. 339, 341.

² *Eichelberger v. Gross*, 42 Oh. St. 549, 554.

³ *Davis v. Combs*, 38 N. J. Eq. 473, 477; *Brown v. Wright*, 5 Ga. 29, 32; *Matlock v. Rice*, 6 Heisk. 33, 36; *Haught v. Parks*, 30 W. Va. 243, 246; *Cochran v. Violet*, 37 La. An. 221, approved in *Smith v. Lewis*, 45 La. An. 1457, 1462.

⁴ *Cook v. Rainey*, 61 Ga. 452, holding that the approval of an annual return, showing expenditures for the ward in excess of his income, constitutes the consent of the court to such expenses; *Latham v. Myers*, 57 Iowa, 519, 520 (to similar effect); *State v. Baker*, 8 Md.

44, 49; *Succession of Tucker*, 13 La. An. 464.

⁵ For instance, in Louisiana: *Voorhis* Civ. C. 1889, Art. 356; North Carolina: Code, 1883, § 1617.

⁶ *Candy v. Hanmore*, 76 Ind. 125, 128.

⁷ *Burnham v. Dalling*, 16 N. J. Eq. 144.

In Georgia, such returns are held competent *prima facie* evidence in favor of the guardian, although erroneously or irregularly passed: *Ragland v. Justices*, 10 Ga. 65, 69; *Rolfe v. Rolfe*, 15 Ga. 451, 457.

⁸ *State v. Roche*, 94 Ind. 372, 378.

⁹ *Freiberg v. De Lamar*, 7 Tex. Civ. App. R. 263, 268.

¹⁰ *Estate of McIntosh*, 158 Pa. St. 525.

The annual returns made by guardians, being of *prima facie* validity, may be rebutted or explained;¹ but the guardian will be estopped, on the ground of public policy, from repudiating his solemn acts and admissions made in his official reports to the court.² So he may conclude himself by his annual statements, if he acquiesce in the action of the court on his account.³ In Mississippi it was held that the annual accounts of guardians are conclusive against them in the court where rendered, and can only be set aside by due course of procedure; inaccuracies, arising from inadvertence, oversight, miscalculation, or palpable mistake may be corrected in the court where returned; but the guardian will not be allowed to gainsay his statements as to the balances in hand;⁴ annual settlements may be opened by a bill of review in behalf of wards, but the guardian is concluded, and no such right is vested in him.⁵ So it has been held in Missouri that annual settlements, while *prima facie* evidence, are in no sense conclusive against the ward,⁶ and not sufficient, if unsupported by other evidence, to establish a balance, found on such annual settlement in favor of the guardian, as a claim against the ward's estate;⁷ and in this view, such balances have been held incompetent as even *prima facie* evidence in favor of the guardian,⁸ though competent against him,⁹ on the ground of constituting solemn admissions.¹⁰ Similarly, in Pennsylvania, as to admission.¹¹ It seems clear on principle, and the current of authority, unaffected by special statutory enactments, is decidedly to the effect, that the allowance by the court of a partial or periodical accounting or settlement, made by a guardian without notice to the parties concerned,

But may be rebutted.

Guardian estopped to deny.

In Mississippi.

In Missouri.

No adjudication unless parties had notice.

¹ *Napier v. Jones*, 45 Ga. 520, 526; *Johnson v. McCullough*, 59 Ga. 212, 228; *State v. Baker*, 8 Md. 44, 49; *Cardwell's Guardianship*, 55 Cal. 137, 142; *Blake v. Pegram*, 101 Mass. 592, 598; *State v. Wheeler*, 127 Ind. 451, 454.

² *Scott v. Haddock*, 11 Ga. 258, 262.

³ *Spedden v. State*, 3 Harr. & J. 251, 271.

⁴ *Coffin v. Bramlitt*, 42 Miss. 194, 206; *Crump v. Geroch*, 40 Miss. 765, 774; *McFarlane v. Randle*, 41 Miss. 411, 425.

⁵ *Johnson v. Miller*, 33 Miss. 553, 558.

⁶ *Kidd v. Guibar*, 63 Mo. 342; *Folger*

v. Heidel, 60 Mo. 284, 288; *West v. West*, 75 Mo. 204, 208; *State v. Jones*, 89 Mo. 470, 478.

⁷ *Murphy v. Murphy*, 2 Mo. App. 156, 159.

⁸ *State v. Roeper*, 9 Mo. App. 21, 22, affirmed in 82 Mo. 57, 59; *Tyler v. Priest*, 31 Mo. App. 272, 280.

⁹ *State v. Roeper*, 82 Mo. 57, 61; *State v. Miller*, 44 Mo. App. 118, 121.

¹⁰ *State v. Richardson*, 29 Mo. App. 595, 601.

¹¹ *Yeager's Appeal*, 34 Pa. St. 173, 177.

and particularly where the ward has not been authoritatively represented, can constitute no adjudication, and is therefore conclusive of nothing, but operates as an admission against interest by the guardian, and is therefore *prima facie* evidence against him; while the evidence upon which the court bases its decision in *passing*, or *allowing*, the account is a sufficiently solemn showing to support it as *prima facie* evidence, liable to be corrected, rebutted, or explained by parol proof or otherwise, in a final settlement, or in a suit between competent parties.¹

¹ Austin v. Lamar, 23 Miss. 189, 191; Campbell v. Williams, 3 T. B. Mon. 122, 124; Tanner v. Skinner, 11 Bush, 120, 129; Roach v. Jelks, 40 Miss. 754, 757; Willis v. Fox, 25 Wis. 646, 650; Cogswell v. State, 65 Ind. 1, 4; Bourne v. Maybin, 3 Woods' C. C. 724, 729; Jenkins v. Whyte, 62 Md. 427, 434; State v. Booth, 9 Mo. App. 583; Starrett v. Jameson, 29 Me. 504, 507; Duckworth v. Kirby, 37 N. E. (Ind.) 729; Oldham v. Brooks, 25 S. W. (Tex.) 648; Schneider v. Burns, 45 La. An. 875, 878; Folger v. Heidel, 60 Mo. 284, 288; Stafford v. Villain, 10 La. 319, 329.

CHAPTER XIII.

OF FINAL ACCOUNTING.

§ 98. **Accounting on Termination of Guardianship.** — On the termination of the guardianship, — whether by reason of the majority of one who was a minor, the death of a ward, the marriage of a female ward, the death of the guardian, or marriage of a female guardian, or of the resignation or removal of the guardian, — the accounting between guardian and ward, or between them and their respective representatives, is final, and the order, judgment, or decree thereon by the court having jurisdiction, is necessarily conclusive against all the world, like any other judgment of a court having jurisdiction of the subject-matter and of the parties. The decree of a probate court having jurisdiction under the statute, rendered on the final settlement of a guardianship, operates as a bar to any future proceeding in that court to compel such settlement, or to a suit in a court of equity for that purpose, and can be attacked only in a direct proceeding for fraud.¹ Unless appealed from, revoked, or reopened, such settlement cannot be col-
Accounting after termination of guardianship is final,
laterally attacked in a suit on the guardian's bond,² and conclusive. or against a deceased guardian's administrator,³ or in any collateral proceeding.⁴ It is held in a Tennessee case In Tennessee prima facie. that a final settlement made by a guardian in the

¹ *Lewis v. Allred*, 57 Ala. 628, 630; *Forrest v. Chamblee*, 51 Ala. 75, 78; *Cummings v. Cummings*, 128 Mass. 532; *State v. Slauter*, 80 Ind. 597; *Lenox v. Harrison*, 88 Mo. 491, 495; *Purdy v. Gault*, 19 Mo. App. 191, 197; *State v. Gray*, 106 Mo. 526, 533; *Phelps v. Buck*, 40 Ark. 219, 222; *Kattelmann v. Guthrie*, 142 Ill. 357, 361.

² *Holland v. State*, 48 Ind. 391; *Mitchell v. Williams*, 27 Mo. 399; *State v. Leslie*, 83 Mo. 60, 61; *McCleary v. Menke*, 109 Ill. 294, 300; *Lynch v. Rotan*,

39 Ill. 14, 21; *Brodrib v. Brodrib*, 56 Cal. 563, 565.

³ *Candy v. Hanmore*, 76 Ind. 125, 129, citing numerous Indiana cases.

⁴ *King v. King*, 40 Iowa, 120, sustaining an action by the guardian against the ward for the balance found due on the final settlement; *Garton v. Botts*, 73 Mo. 274; *Reed v. Ryburn*, 23 Ark. 47, 48; *Rawlings v. Giddens*, 46 La. An. 1136, 1142; *Thompson v. Hartline*, 16 S. (Ala.) 711.

County Court is only *prima facie* correct, and constitutes no bar to the suit of the ward to recover a fund which came to the guardian's hands before appointment as such, and was never accounted

for.¹ And in Kentucky the settlement of a guardian, who had been superseded by another, made by commissioners, in accordance with the statute, and reported to and approved by the County Court, is presumed to be *prima facie* cor-

rect.² So, a distinction is drawn in Missouri between the binding effect of a final settlement by an administrator on his sureties, which is held to be conclusive, and that of a guardian or curator on his sureties, which is held to be *prima facie*, the sureties being allowed to show anything to exonerate them from liability, though contrary to the settlement.³

The binding quality of a final settlement between guardian and ward rests upon the fundamental legal maxim, that what a court of competent jurisdiction has once adjudicated, cannot be called

in question in either the same or any other court;⁴ hence, if any of the elements are wanting which are necessary to the jurisdiction of the court, the judgment or decree of such court is void or voidable, at least in the particular to which the jurisdiction does

not extend.⁵ If, therefore, a guardian is also the testamentary trustee of his ward, and his final settlement is made between himself as guardian and himself as trustee of the ward, the judgment is not rendered between parties *sui juris*, — the ward has not had her day in court, because the moment her disability as an infant ceased, the legal title to her estate vested in the trustee, and his receipt as trustee to himself as guardian concludes neither the

¹ *Henley v. Robb*, 2 Pickle, 474, 483. It is to be noticed that the action in this case was for a sum of money not mentioned in the settlements of the guardian, and would be tenable on the principle that a final settlement is conclusive only as to the matters lawfully embraced therein; as to which see *infra*. The cases of *Pickens v. Bivens*, 4 Heisk. 229, and *Matlock v. Rice*, 6 Heisk. 33, are referred to as authority for the statement that final settlements in the county courts are only *prima facie* correct. In the first of these the conclusiveness of the settlement was not in question, but only the power of the

County Court to enforce its finding by judgment and execution; and in the other, annual settlements only are mentioned, and nothing is said of final settlements.

² *Campbell v. Williams*, 3 T. B. Mon. 122, 124.

³ *State v. Martin*, 18 Mo. App. 468, 473 *et seq.* The distinction is predicated on the difference of the language in the bonds of administrators and of guardians, and refers to *State v. Grace*, 26 Mo. 87, as authority.

⁴ *Woerner on Adm.* §§ 505 *et seq.*

⁵ See authorities cited under §§ 505 and 506, *Woerner on Adm.*

cestui que trust as to her rights as ward, nor the trustee's sureties from showing that no estate was transferred from the guardian to the trustee, and holding the sureties on the guardian's bond liable.¹

It is evident that a judgment in a settlement based upon an inventory erroneously or intentionally omitting a part of the ward's property, is not conclusive upon the ward as to the property so omitted, nor does the ward's receipt in full of all claims against the guardian bar her from recovering the property, although it be in possession of a purchaser from the guardian.²

To constitute a valid final settlement between guardian and ward, binding on all parties, the statutory provisions respecting the same must be fully complied with.³ Without the notice required by the statute, probate courts have no authority to allow a guardian's final account, or to enter satisfaction of it, or to decree a discharge of the guardian; the defect, for these purposes, is jurisdictional.⁴ But the nullity arising from the want of such compliance with the statutory requirements is not an absolute, but a relative one.⁵ In Missouri a final accounting made without the statutory notice is held to have the effect of an annual accounting;⁶ and in Texas, if the ward, having attained majority, indorsed an approval of the settlement account, an order discharging the guardian made, by the Probate Court, is valid.⁷

Statutory provisions must be complied with to make settlement binding.

Judgment voidable if not complied with.

In Missouri.

In Texas.

The notice to the ward need not be personal, unless the statute

¹ *State v. Branch*, 112 Mo. 661, 664. It is to be observed that the validity of the settlement is not assailed in this case, the ward having been duly notified and represented by attorney; but only the validity of the receipt, which was signed by the trustee alone, and filed about a year after the order of the court was made on the guardian to pay to the trustee, and the trustee's acknowledgment of satisfaction of said order, upon which the guardian obtained his discharge.

² *Le Bleu v. North American Co.*, 46 La. An. 1465.

³ *Mead v. Bakewell*, 8 Mo. App. 549; *Harty v. Harty*, 2 La. 518, 523. And see *ante*, § 97. Also *State v. Hoster*, 61 Mo. 544; *White v. Gleason*, 15 La. An. 479.

⁴ *Jacobs v. Fouse*, 23 Minn. 51, 54; *Buchanan v. Grimes*, 52 Miss. 82; *Jenkins v. Whyte*, 62 Md. 427, 434; *Gravett v. Malone*, 54 Ala. 19, 21; *Moore v. Cason*, 1 How. (Miss.) 53, 61; *Bogia v. Durden*, 41 Ala. 322; *Croft v. Ferrell*, 21 Ala. 351; *Culver v. Brown*, 16 N. J. Eq. 533, 534.

⁵ *Collins v. Collins*, 10 La. 264, 268, relying on *Foutelet v. Murrell*, 9 La. 299, 305, holding that informalities, or relative nullities, must be taken advantage of by the minors themselves, and that until set aside, the transactions are binding upon third persons: *Tutorship of Hacket*, 4 Robin. 290, 296.

⁶ *Murphy v. Murphy*, 2 Mo. App. 156; *State v. Hoster*, 61 Mo. 544.

⁷ *Roberts v. Schultz*, 45 Tex. 184.

so require,¹ or the order of court so direct;² and the guardian cannot object on error that the notice required by the statute has not been given.³ Where a married woman settles a guardianship account, a decree against her husband alone is erroneous; it should be against both husband and wife.⁴

Where the statute requires the appointment of a guardian *ad litem* to represent the ward on final settlement of a guardianship

Guardian *ad litem*, if required by statute, must be appointed and accept.

account, the appointment is not completed until the assent of the person appointed is signified; his mere presence at the trial and making no objection, although he had been notified of his appointment, is not an acceptance of the position, and a final settlement under such circumstances is void.⁵ But it is not necessary that the ward,

Guardian cannot object on ground that no guardian *ad litem* was appointed.

although above the age of fourteen, make personal choice of the guardian *ad litem*.⁶ Neither the guardian nor the sureties can avoid a partial or final settlement of the guardianship, because the ward was not represented by a guardian *ad litem*, though the ward may.⁷

§ 99. Final Accounting before the Cessation of the Ward's Disability. — The term "final accounting" or "final settlement" implies an accounting or settlement after the severance of the rela-

No final settlement before cessation of guardian's authority.

tionship between guardian and ward. Unless one of the events have transpired which conditions the cessation of the guardian's authority, the settlement cannot be final, because the liability of the guardian extends beyond the time of such settlement.⁸ Until the authority of the guardian is terminated by the ward's majority, or by the marriage of a female ward, or by the death, resignation, or removal of the guardian, he is the proper custodian of the ward's funds, and the latter has no legal right to demand or receive his estate. That cause exists for the guardian's removal does not operate to terminate his authority, and limitation does not begin to run until such termination.⁹ "That an action at common law," says Devens, J.,

¹ *Stabler v. Cook*, 57 Ala. 22, 25.

² *Frierson v. Travis*, 39 Ala. 150, 152.

³ *Treadwell v. Burden*, 8 Ala. 660, 662.

⁴ *McGinty v. Mabry*, 23 Ala. 672; *Whitten v. Graves*, 40 Ala. 578.

⁵ *Laird v. Reese*, 43 Ala. 148, 152; *Frierson v. Travis*, 39 Ala. 150, 153.

⁶ *Stabler v. Cook*, 57 Ala. 22, 25.

⁷ *May v. Duke*, 61 Ala. 53, 56.

⁸ *Hughes v. Ringstaff*, 11 Ala. 563, 566; *Lewis v. Allred*, 57 Ala. 628, 631; *Glass v. Glass*, 80 Ala. 241; *State v. Peckham*, 136 Ind. 198, citing earlier Indiana cases.

⁹ *Minter v. Clark*, 8 Pickle, 459.

in *McLane v. Curran*,¹ "cannot be maintained between a guardian and a ward, while that relation exists, is clear."² But the report of a guardian who was permitted to resign and the judgment of the Probate Court granting such permission and discharging him from his office, is no adjudication that the guardian's account has been settled; there must be a subsequent accounting,³ which may be had between the former guardian and a successor duly appointed, whose duty it will be to represent the ward, so that the ward will be bound by the decree of the court rendered on such accounting, although no guardian *ad litem* be appointed.⁴ Obviously such settlement is conclusive also on the former guardian,⁵ who, if he appear voluntarily to make the settlement, will not afterward be heard to object that the record does not show that his successor was made a party, or that the statutory notice had not been given.⁶ But the collusive appointment of a new guardian, and collusive settlement with him, do not conclude the ward;⁷ nor can a decree relieving a ward from the disability of infancy, obtained by fraud and collusion, validate a guardian's settlement during her infancy without the appointment of a guardian *ad litem*.⁸ But where the successor to a guardian having resigned, accepts his own note from his predecessor, in payment of the indebtedness found to be due by the latter to his ward in a settlement made between him and his successor, he is not liable to the ward for the amount of the note, if the parties acted in good faith, and the successor was deemed amply solvent.⁹

The same principle applies on the severance of the relationship between guardian and ward caused by the revocation of the guardian's authority, or his removal from office. The settlement which a guardian on his removal makes is a final settlement,—not in the sense of a settlement of the ward's entire guardianship during minority, but binding to the extent of the removed guardian's share in the same.¹⁰ Upon

Settlement must be with a successor,

and is then binding on both,

unless it was collusive.

Settlement on revocation.

¹ 133 Mass. 531, 532.

² The same is true where the ward is a lunatic: *Brown v. Howe*, 9 Gray, 84.

³ *King v. Hughes*, 52 Ga. 600, 604.

⁴ *Jones v. Fellows*, 58 Ala. 343, 346.

⁵ *Ammons v. People*, 11 Ill. 6; *Ream v. Lynch*, 7 Ill. App. 161.

⁶ *McLeod v. Mason*, 5 Port. 223.

⁷ *Ellis v. Scott*, 75 N. C. 108; *Manning v. Manning*, 61 Ga. 137, 140.

⁸ *Cox v. Johnson*, 80 Ala. 22.

⁹ But it would have been otherwise, if he had known the successor to be insolvent; *Hill v. Lancaster*, 88 Ky. 338, 344.

¹⁰ *State v. Bilby*, 50 Mo. App. 162, 168.

the removal of the guardian it is a matter of course to require him to account, and to pay over to his successor the balance, if any, found remaining in his hands.¹ The successor, when legally

Successor is responsible for estate delivered to him. appointed and duly qualified, is legally entitled to the custody and estate of the ward; hence, the former guardian is not responsible for a subsequent wasting

of the estate by the successor.² By the agreement of the successor of a guardian to accept from his predecessor a stock of goods in discharge, among other things, of his indebtedness to the ward; he makes himself chargeable with such indebtedness to his ward, and is liable therefor on his bond; but the liability of the first guardian is not thereby discharged; the ward simply acquired an additional remedy against the second guardian and

his bondsmen.³ But where the discharge is by an accounting *in pais*, that is where there is no *bona fide* adverse controversy between the guardian representing the ward and the guardian removed, a decree

made on such accounting (though made under the formalities of a court of equity) may be impeached by the ward, and it is not necessary to show actual fraud between the parties.⁴ For a fail-

Penalty for failing to pay successor. ure to pay over to his successor the money in his hands belonging to the estate of the ward, the guardian and his sureties are liable, in Indiana, for the

amount found due and ten per cent damages thereon.⁵ In Missouri the removal of a guardian is held equivalent to an order to pay over to the successor the money in his hands belonging to the ward, so as to sustain an action against the guardian removed on his bond.⁶

Where a guardian, without having settled his accounts, had become *non compos mentis*, it was held, under a statute making no provision in direct terms for such case, but conferring on the Probate Court original jurisdiction to appoint and remove guardians for minors and persons of unsound mind, and to decide "all controversies as to the right of guardianship and the settlement of guardian's

¹ Skidmore v. Davies, 10 Paige, 316, 317; Simpson v. Gonzalez, 15 Fla. 9, 52.

² Simpson v. Gonzalez, 15 Fla. 9, 53.

³ Martin v. Davis, 80 Wis. 376.

⁴ Batts v. Winstead, 77 N. C. 238.

⁵ Baldrige v. State, 69 Ind. 166; Kinsey v. State, 71 Ind. 32, 40.

⁶ Finney v. State, 9 Mo. 227, 231; State v. Engelke, 6 Mo. App. 356, 360.

accounts," and to make settlement of the guardianship of a ward after the guardian's death, that the Probate Court may compel or allow the guardian of such *non compos* to settle the guardianship account, and decree payment to the minor's guardian, to be levied of the goods and chattels of the *non compos*.¹

The marriage of a female guardian in some States determines her authority,² without any order of the Probate Court;³ while in others married women are competent, and it is within the discretion of the surrogate to determine whether the marriage of a *feme sole* shall revoke her guardianship or not;⁴ and in yet others such marriage does not dissolve the relation of guardian and ward,⁵ or has the effect of joining her husband with her.⁶ In Louisiana, if the mother, as natural tutrix of her children, contracts a second marriage without previously causing a family meeting to convene in order to determine the question whether she is to remain tutrix after the marriage, she *ipso facto* loses her tutorship. In such case the children of the previous marriage have a legal mortgage on the property of the new husband, for the acts of the tutorship unlawfully kept by the mother.⁷ Where a female guardian, after her marriage in a State in which such marriage extinguishes her authority, continues in charge of the ward's property, and to receive rents and profits, the ward has an action against her on attaining majority, as bailiff; and such action does not lie in the Probate Court.⁸

Effect of marriage of female guardian.

Provision is made by statute, in most States, for the settlement of a deceased guardian's account by his personal representatives.⁹ The settlement of such an account by the representatives of the deceased guardian is held in Missouri to be of *prima facie* validity against the sureties on the guardian's bond.¹⁰ But probate courts have power

Accounting for deceased guardian.

¹ And such decree is conclusive against the minor and his new guardian: *Modawell v. Holmes*, 40 Ala. 391, 401 *et seq.*

² As to incompetency of married women, see *ante*, § 33.

³ *Carr v. Spannagel*, 4 Mo. App. 284, 287; *Field v. Torrey*, 7 Vt. 372, 387; *Farar v. Olmstead*, 24 Vt. 123, 125.

⁴ *Swartwout v. Swartwout*, 2 Redf. 52; *Elgin's Guardianship*, Tucker, 97.

⁵ *Cotton v. Wolf*, 14 Bush, 238, 246.

⁶ *Martin v. Foster*, 38 Ala. 688, 690;

Carlisle v. Tuttle, 30 Ala. 613, 624; *Wood v. Stafford*, 50 Miss. 370.

⁷ *Keene v. Guier*, 27 La. An. 232.

⁸ *Field v. Torrey*, 7 Vt. 372, 386.

⁹ So among others in Alabama: Code, 1887, § 2471; Connecticut: Gen. St. 1887, § 617; Maryland: Publ. Gen. L. 1888, Art. 93, § 182; Missouri: Rev. St. 1889, § 5333; Arkansas: *Connelly v. Weatherly*, 33 Ark. 658, 662.

¹⁰ *State v. Grace*, 26 Mo. 87, 91; *State v. Martin*, 18 Mo. App. 468, 473; *Cohen v. Atkins*, 73 Mo. 163, 166.

Probate Court may compel representative of deceased guardian to account.

to demand and compel accounting for deceased guardians, by their personal representatives, in virtue of the general jurisdiction vested in them to settle guardian's accounts, which is not divested, changed, or limited by the death of the guardian; and the proper course is to cite the representative of the deceased guardian in to attend the adjustment of the account.¹ And there seems to be no reason why such accounting should not be as conclusive as if made with the deceased guardian while living. In Arkansas it is held, that although there can be no action upon the guardian's bond against the sureties, before final settlement in the Probate Court, it does not follow that the wards may not, as creditors, exhibit their claims against the deceased guardian's estate, because, whether the settlement was made or not, they were compelled to present their claims within two years after grant of administration, or be barred by the statute of non-claim.²

In Maryland, on the death of a female guardian, the husband is by statute required to account for her, and may be compelled to do so by attachment.³

§ 100. **Accounting on Ward's Death or Marriage.** — In most States guardians are required by statute to settle the final account of their guardianship upon cessation of their authority, whether by the death or majority of their wards, or restoration to sanity of insane wards, or the marriage of female wards.

The death of an infant is allowed, in some States, to constitute an exception to the general rule of law requiring the devolution of personal property to an executor or administrator on the death of the owner,⁴ because infants are presumed not to have incurred any liabilities,⁵ although the wisdom of the rule is not unconditionally conceded.⁶ The presumption upon which the rule is based may be rebutted,⁷ and in such case, although

Estate of a minor dying may be distributed by guardian under order of Probate Court;

¹ *Waterman v. Wright*, 36 Vt. 164, 169; *Peel v. McCarthy*, 38 Minn. 451; *Tudhope v. Potts*, 91 Mich. 490, 492; *Woodbury v. Hammond*, 54 Me. 332, 343.

² *Connelly v. Weatherly*, 33 Ark. 658.

³ *Publ. Gen. St. Art. 93, § 183.*

⁴ *Miller v. Eatman*, 11 Ala. 609, 614.

⁵ *Lynch v. Rotan*, 39 Ill. 14, 20; *McCleary v. Menke*, 109 Ill. 294, 300.

⁶ "This was going, perhaps, too far; because even infants may be liable for necessities:" per Johnston, Ch., in *Cobb v. Brown*, Speers Eq. 564, 568.

⁷ By proof of the existence of claims against the estate of the ward: *George v. Dawson*, 18 Mo. 407; or by his having been married and leaving a widow: *Norton v. Thompson*, 68 Mo. 143.

the statute provide for distribution of such infant's estate by the guardian,¹ there must be administration, and the accounting by the guardian must be with the personal representative of the deceased ward. but not if the ward left liabilities.

In Indiana, where the estate of a deceased minor does not exceed the value of \$500, the guardian reports such fact and the condition of the estate to the Probate Court, and settles it without the intervention of administrators.²

In Texas, it is held, that where all the parties interested in a deceased minor's estate are before the court at the trial of a guardian's settlement, the court has authority to settle the accounts, and administration is not necessary on the ward's estate.³ In Texas administration not necessary. So it was held in North Carolina, that where there is no complaint of misconduct on the part of a guardian, but only the *manner* of accounting objected to, a separate statement of the account between the guardian and the administrator of a deceased minor ward In North Carolina. is not requisite, nor is it a ground of exception to the guardian's account, that the deceased ward's estate was distributed and blended with the estates of the other wards where there is no necessity for administration.⁴

In Wisconsin the Supreme Court inclines to negative the authority of the court having jurisdiction over the guardian, to adjust the guardian's account after the ward's death, but declined to so decide.⁵ Quære in Wisconsin.

Where the estate of a deceased minor is not distributed by the guardian, but subjected to administration in the hands of a personal representative, the correct practice is to require the guardian to make settlement, and order him to pay over to the administrator, or to such other person as may be authorized to receive it, whatever may be ascertained to be in the hands of the guardian.⁶ Guardian is ordered to pay balance in hand to ward's representative.

The marriage of a ward of either sex of necessity terminates

¹ As it does in Georgia: *Beavers v. Brewster*, 62 Ga. 574, 580; Missouri: Rev. St. 1889, § 5326.

² Rev. St. 1888, § 2523.

³ *Berry v. Young*, 15 Tex. 369, 371; *Fortson v. Alford*, 62 Tex. 576, 579. But neither of these cases decide the question, whether the court could, without administration, order after the ward's

death the sale of real estate for the payment of debts, or to reimburse the guardian for expenses incurred during the administration; and this is negatived in *Alford v. Halbert*, 74 Tex. 346, 354.

⁴ *McNeil v. Hodges*, 83 N. C. 504, 510.

⁵ *Israel v. Silsbee*, 57 Wis. 222, 232.

⁶ *Egner v. McGuire*, 7 Ark. 107, 111.

Marriage terminates guardianship of person,

and, at common law, of estate of female.

So in many States if she marry an adult.

Whether her property goes to her, or the husband's guardian, *quære*.

the guardianship over the ward's person.¹ This principle is of universal acceptance so far as applied to the person of a female ward,² whether she marry a minor or an adult, for her relation to a husband is inconsistent with the power of a guardian over her person.³ And at common law the guardianship of a female ward is terminated, in respect of her estate also, by her marriage to an adult, because the wife's property is vested in or under the control of her husband.⁴ The same rule is held or enacted by statute in many States.⁵ But where the female ward marries a minor, or one who is himself under guardianship, it is not so clear whether the wife's guardian retains authority over her property, — because the marriage of the male ward does not, without statutory provision to that effect, determine the guardianship over *his* estate,⁶ — or whether it shall go from the wife's to the husband's guardian. Since the right to reduce to possession the wife's choses cannot be exercised by her, for her right to do so ceased on her marriage, nor by her guardian, because it belongs to the husband, nor by the husband, because he is himself under disability of infancy, this right must necessarily be exercised, if at all, by the husband's guardian.⁷ Hence, it would seem, that in case of marriage between two infants, the guardian of the male retains control of his ward's estate, and that he is entitled to the control of the estate of his ward's wife, also, whose guardian must account to him.⁸

Macpherson states, that in England the Court of Chancery never appoints a guardian to a female infant after her marriage, nor discharges an order for a guardian because of marriage; probably because the marriage of a

In England chancery appoints no guardian to a married woman,

¹ Schoul. Dom. Rel. § 313.

² Nicholson v. Wilborn, 13 Ga. 467, 471.

³ Reeves' Dom. Rel. (4th ed.) 403.

⁴ Macph. on Inf. 90; Burr v. Wilson, 18 Tex. 367, 375.

⁵ Brick's Estate, 15 Abb. Pr. 12, 14; Jones v. Ward, 10 Yerg. 160, 168; Porch v. Fries, 18 N. J. Eq. 204, 207; Nicholson v. Wilborn, 13 Ga. 467, 471; Armstrong v. Walkup, 12 Gratt. 608, 612; Bartlett v. Cowles, 15 Gray, 445, 446; Barnet v. Commonwealth, 4 J. J. Marsh. 389;

Bourne v. Maybin, 3 Woods, 724, 730; Kidwell v. State, 45 Ind. 27, 29; such an infant married woman, though she can have no general guardian, may bring an action in her own name in reference to her separate property, but must have a guardian *ad litem* for that particular suit: Post, *ex parte*, 47 Ind. 142; to similar effect: Wise v. Norton, 48 Ala. 214, 218.

⁶ Ware v. Ware, 28 Gratt. 670, 674.

⁷ Ware v. Ware, *supra*.

⁸ See Schoul. Dom. Rel. § 313.

female, of its own force, supersedes guardianship;¹ and it is held, under American statutes terminating the guardianship upon the marriage of a female ward, that as soon as such guardianship ceases, the relation of debtor and creditor begins between the guardian and his late ward.² In New York, however, it is doubted whether a female ward is discharged, on her marriage, from the protection of the Court of Chancery, without a special order of the court,³ and since the Married Women's Act of 1848 it is there held that an existing guardianship of a female infant is not terminated by her marriage; that the husband in such case, though an adult, does not acquire control of her property; and that the surrogate's court has authority to appoint a guardian of the estate of a married female infant.⁴

nor discharges on marriage of female.

When guardianship ceases, relation of debtor and creditor begins.

In New York.

In Michigan the statute provides that the marriage of a female ward terminates the guardianship of the person, but not of her estate.⁵

In Michigan.

But while the guardian's authority over his female ward ceases on her marriage, his liability to account does not. He may settle with his late ward's husband and deliver to him the ward's estate;⁶ but if he fails to do so, the Probate Court has still jurisdiction over him to compel him to account.⁷ Her remedy is the same as that of any other ward against her guardian.⁸ But in such case no suit lies on the guardian's bond unless the husband be of full age.⁹

Liability to account does not cease.

Probate Court may still compel accounting.

The marriage of a male ward has no effect upon the guardianship of his estate.¹⁰

Marriage of male ward does not affect estate.

Whether the guardian can interpose the statute of limitations as a defence to a citation or bill for an accounting is ruled differently in the different States, even aside from the difference created by the terms

Statute of limitations: whether a defence?

¹ Macph. on Inf. 113.

² Bourne v. Maybin, 3 Woods, 724, 731.

³ Matter of Whitacre, 4 Johns. Ch. 378, citing English authorities.

⁴ Matter of Herbeck, 16 Abb. Pr. (N. S.) 214.

⁵ Wohlscheid v. Bergrath, 46 Mich. 46, 49; Howell's Ann. St. 1882, § 6329.

⁶ Porch v. Fries, 18 N. J. Eq. 204, 207; Shutt v. Carloss, 1 Ired. Eq. 232, 238; Mo-

bley v. Leophart, 47 Ala. 257, 261; Beazley v. Harris, 1 Bush, 533, 535.

⁷ Price v. Peterson, 38 Ark. 494, 495; Wise v. Norton, 48 Ala. 214, 216.

⁸ Story v. Walker, 64 Ga. 614, 616.

⁹ Burkam v. State, 88 Ind. 200; State v. Joest, 46 Ind. 235, 238.

¹⁰ 9 A. & E. Encycl. p. 95, and authorities under note 4.

of various statutes. Chancellor Kent announced a rule distinguishing between merely equitable trusts, not cognizable by courts of law, and trusts upon which actions at law may be maintained; the latter are not exempted from the operation of the statute; while to the former it does not apply so long as it remains a continuing and subsisting trust, acknowledged or acted on by the parties; but if the trustee denies the right of his *cestui que trust*, and the possession of the property becomes adverse, the lapse of time, from that period, may constitute a bar in equity.¹ It was accordingly held that since chancery has concurrent jurisdiction with courts of law to compel accounting by a guardian, the Chancery Court will apply the statute of limitations to a bill against a guardian filed eight years after the ward came of age.² But where the guardian has kept the fund separate from his own property, and never informed the wards of its existence, and in no wise repudiated or denied the trust, lapse of time since the majority of the ward constitutes no bar.³

In other States the guardian is liable to account to his ward notwithstanding the statute of limitation has run its course.⁴ But lapse of time without claim or admission of an existing right, coupled with circumstances tending to show that a trust has been performed, may raise a presumption of its execution;⁵ and the statute of limitation will bar a claim where the ward delayed for a long time to ask for an accounting, having had the means to ascertain the facts upon which the claim is based.⁶

§ 101. **Statement of the Account.** — The distinction between stating, rendering, or filing a guardian's account, and settling it, is in

¹ Kane v. Bloodgood, 7 Johns. Ch. 90, affirmed in Bloodgood v. Kane, 8 Cow. 360.

² Bertine v. Varian, 1 Edw. Ch. 343.

³ In re Camp, 3 N. Y. Supp. 335, affirmed in s. c. 10 N. Y. Suppl. 141.

⁴ Gilbert v. Guphill, 34 Ill. 112, affirmed in Bruce v. Doolittle, 81 Ill. 103, on the ground that the citation to account before the Probate Court is not in the nature of the action of account at law or in equity, but a mere mode provided to ascertain the sum for which a guardian is

chargeable in the Probate Court, to lay the foundation for proceedings against the sureties in the guardian's bond. Governor v. Hooker, 19 Fla. 163, 172, on the ground that as between the trustee and the *cestui que trust* limitation does not run.

⁵ The natural presumption is very strong where the guardian has lived a long time after the termination of the relation, and the claim is not made until after his decease: Gregg v. Gregg, 15 N. H. 190.

⁶ Heath v. Elliott, 83 Iowa, 357.

many of the States indicated by the statute. Thus it is required that the guardian file his account, verified by affidavit, together with his vouchers, of which notice must be given; and if objection is made, the court must examine the vouchers and require evidence, if necessary, decreeing as may be just and entering of record its finding.¹ An account thus rendered or stated becomes an account settled when the balance due thereon has been ascertained, reduced to writing, and decreed as final and conclusive, and then paid.² The mere ascertainment of a final balance does not constitute a "final settlement" in the sense of the statute directing final settlement between guardian and ward; payment of that balance is also included, so that nothing shall remain to be done by the guardian in his fiduciary capacity, and he may be fully discharged from his trusts, as having completely performed them.³

Stating and settling the account.

Account stated becomes account settled on decree showing payment of balance ordered to be paid.

The account should include only such matters as constitute transactions between guardian and ward, and close with the termination of the guardianship.⁴ Of transactions occurring after the ward has attained majority, the Probate Court has no jurisdiction.⁵ And so as to money improperly paid to a guardian who had no right to receive it,⁶ and of a partnership account between the tutor and the minor's father, antedating the guardianship.⁷ Some cases holding, apparently, that the court may entertain jurisdiction over matters extending beyond the ward's majority, are reconcilable with the principle stated, when

The account includes only matters between guardian and ward.

¹ So in Alabama: Code, 1887, §§ 2455-2463. Similarly in Arkansas; Illinois: St. & Curt. Ann. St. 1896, ch. 64, ¶ 16; Minnesota: Gen. St. 1891, §§ 5780-5782; Mississippi: Ann. Code, 1892, § 2225; Missouri: Rev. St. 1889, § 5329; Nebraska: Comp. St. 1891, § 282; New Jersey: Rev. St. 1877, p. 774, §§ 101-105; Texas: Sayler's Civ. St. 1888, Art. 2602-2606; and other States.

² McDow v. Brown, 2 S. C. 95, 105.

³ Angevine v. Ward, 66 Ind. 460, 463.

⁴ Cunningham v. Cunningham, 4 Gratt. 43, 46; Crowell's Appeal, 2 Watts, 295; Bull v. Towson, 4 Watts & S. 557, 568; Merrells v. Phelps, 34 Conn. 109.

See Long v. Long, 142 N. Y. 545, 554, holding that the ratification of an unauthorized act, to be binding, must be by a competent person, with knowledge of all the facts, and of their legal bearing upon his rights.

⁵ Allgier, *in re*, 65 Cal. 228; People v. Seelye, 146 Ill. 189, 214; Shelton v. Smith, 3 Baxt. 82; Evans' Estate, 11 Pa. Co. Ct. 324, 327.

⁶ Hinckley v. Harriman, 45 Mich. 343; Allen v. Crossland, 2 Rich. Eq. 68, 73. And similar in effect: Hindman v. State, 61 Md. 471, 476.

⁷ Matter of Hollingsworth, 45 La. An. 134, 146.

the circumstances are considered that led to such decisions.¹ Thus credit should not be refused for moneys paid the ward's mother for boarding after majority, to which the ward did not object.² Nor is any decree final, which leaves anything further to be done by the court; hence, a decree approving the final accounts of the guardian, but failing to direct how certain of the funds deposited in a bank are to be disposed of, and how costs thereafter to accrue are to be provided for, is not final, but interlocutory.³

Interlocutory
decree is not
final.

As to all matters lawfully embraced therein, the final settlement is conclusive;⁴ but matters not embraced therein are not concluded, and the ward may recover of the guardian personally a fund which came to the guardian's hands before his appointment, and which was never accounted for in his settlements.⁵ Nor are matters concluded which are only collaterally introduced, and not properly entering into the accounts, or over which the court has no jurisdiction,⁶ or which have not been adjudicated by the court.⁷ It is held in Missouri, that final settlements are conclusive even as to items properly entering into the account, although omitted by the curator in making the settlement.⁸

The account is
conclusive on
matters em-
braced,

but not of such
as are not em-
braced in the
guardian's offi-
cial capacity.

In Missouri.

To the account rendered, which must include all the items contained in each partial settlement,⁹ exceptions may be filed, and it is the duty of the court¹⁰ to examine the

Exceptions to
be passed on
by the court.

¹ See the reasoning of Chief Justice Bailey, in the case of *People v. Seelye*, *supra*, reviewing *Mellish v. Mellish*, 1 Simons & Stuart, 138, 145; *Pyatt v. Pyatt*, 46 N. J. Eq. 285, 287 (resting on the authority of *Mellish v. Mellish*, and holding that the Probate Court was under the statute vested with full chancery powers); *Armstrong v. Walkup*, 12 Gratt. 608, 612; and *Bombeck v. Bombeck*, 18 Mo. App. 26, 33.

² *McNeil v. Hodges*, 83 N. C. 504, 508.

³ *Whitehead v. Bradley*, 87 Va. 676, 680, relying on *Rawlings v. Rawlings*, 75 Va. 76, 83, and *Noel v. Noel*, 86 Va. 109, 111.

⁴ *Candy v. Hanmore*, 76 Ind. 125, 129; *State v. Gray*, 106 Mo. 526, 533; *Briscoe v. Johnson*, 73 Ind. 573, 576.

⁵ *Henley v. Robb*, 2 Pickle, 474, 483. To similar effect: *Warfield v. Warfield*,

76 Iowa, 633, 638; *Naugle v. Burton*, 101 Ind. 284, 288; *Taylor v. Calvert*, 37 N. E. (Ind.) 531; *Hodnett's Estate*, 154 Pa. St. 491, 497; *Le Blean v. Land and Timber Co.*, 46 La. An. 1465; *Powell v. Powell*, 52 Mich. 432, 434; *Lataillade v. Orena*, 91 Cal. 565, 576.

⁶ *Patterson v. Booth*, 103 Mo. 402, 419; *In re Hollingsworth*, 45 La. An. 134, 147.

⁷ *Wainwright v. Smith*, 106 Ind. 239, 241; *State v. Peckham*, 36 N. E. (Ind.) 28.

⁸ *Patterson v. Booth*, *supra*.

⁹ So provided by statute in Pennsylvania: Bright. Purd. Dig. 1883, p. 516, § 46; *Yeager's Appeal*, 34 Pa. St. 173, 175.

¹⁰ The exceptions cannot be tried by a jury: *Finley v. Schlueter*, 54 Mo. App. 455, 458.

account and pass on the objections made thereto,¹ and if necessary, to restate, or cause to be restated, the account according to the finding of the court.² On such examination the accounting guardian is a competent witness, and may be examined by the court, at the instance of either party, or *ex mero motu*.³ Co-heirs having a common tutor may join or intervene in opposing an account presented by the tutor for approval to the Probate Court;⁴ but the wards not so joining or intervening are not, of course, bound by the proceeding. It appears from a former chapter on the subject of probate bonds that one bond may be given for the protection of several minors having the same guardian;⁵ in such case the guardian and his sureties are liable on the bond for a breach thereof to each of the several wards, in a separate action by each ward on attaining majority; hence, the recovery by one of the wards is no bar to a subsequent action on the bond by another ward, who was not a party to the former action.⁶ So, too, creditors of a ward are entitled to be heard in the matter of allowing the guardian's account, and may appeal if aggrieved by the judgment of the Probate Court;⁷ and so the sureties of the guardian may intervene for their own protection.⁸ The report should state all the circumstances and the situation of the parties, so as to enable the court to make an intelligent determination of their rights. A demurrer may not be the proper practice; but there should be a motion for a more specific statement, where it is deficient in this respect.⁹

Guardian is a competent witness.

Co-heirs may intervene,

but are not bound by the decree unless they do.

Sureties on a bond common to several wards liable to suit on each.

Creditors of ward and sureties of guardian may intervene.

Court may order the account to be made more full.

§ 102. **Procedure in Accounting.** — The statutes of the several States mostly provide that for all credits claimed in his accounts the guardian shall produce proper vouchers; though some allow small items to be proved by the oath of the

Vouchers required.

¹ *Gulick v. Conover*, 15 N. J. L. 420; *Rowland v. Thompson*, 64 N. C. 714, 717. In Vermont the court may pass a settlement without examination, if otherwise satisfied of its correctness: St. 1894, § 2808.

² *McFarlane v. Rundle*, 41 Miss. 411, 428.

³ *Davison v. Davison*, 17 N. J. L. 169, 171; Minn. Gen. St. 1891, § 5781.

⁴ *Tutorship of Hacket*, 4 Robin. 290, 295.

⁵ *Ante*, § 38.

⁶ *Cotton v. State*, 64 Ind. 573, 580.

⁷ *Hause, in re*, 32 Minn. 155, 156.

⁸ *Estate of Spath*, 144 Pa. St. 383, 392.

⁹ *Gerdes v. Weiser*, 54 Iowa, 591, 594; *Rawls v. Rawls*, 6 La. An. 665; *In re Hollingsworth*, 45 La. An. 134, 141.

guardian.¹ The acknowledgment and payment by guardians of debts due from the estates administered by them are held in some States *prima facie* evidence of their correctness;² and while courts cannot be too strict and vigilant in the investigation of accounts in cases where presumptions of bad faith or dishonesty rebut the *prima facie* evidence, by reason of extravagant charges, purchase of articles not needed, concealment of funds or anything of the kind, — yet guardians should not, in the settlement of their accounts, be held to the strictest rules of evidence. It cannot be expected that they can always have witnesses to their various transactions; and were they obliged to prove the signature to every receipt for debts paid, supplies purchased, etc., the expense of summoning witnesses, taking depositions, etc., would involve heavy and oftentimes unnecessary expenses.³

In the absence of proper vouchers, or other sufficient proof, the credits should be rejected.⁴ But the payment of debts contracted by the guardian on account of his ward before, though not paid until after, his dismissal, may be shown by competent evidence, without first having vouchers for such disbursements approved by the court.⁵ Nor is it necessary to present claims for expenses incurred by the guardian, in preserving the ward's estate, to the Probate Court for allowance, like claims presented against executors or administrators.⁶ Probate courts have no jurisdiction to allow claims against living minors, except in passing upon guardian's settlements, unless thereto authorized by statute.⁷ Vouchers should not be rejected on account of their generalness; but if they show carelessness in the mode of keeping the account, they ought to be

strictly proved to support the charges made.⁸ A statute of Ohio provides that vouchers signed by an idiot, lunatic, or imbecile shall not be received in a guardian's settlement.⁹

¹ So in New York, items not exceeding \$20, if the oath be uncontradicted, and the whole amount in any one estate do not exceed \$500: *Matter of Gill*, 5 Th. & C. 237.

² *Baillio v. Wilson*, 6 Mart. (n. s.) 334, 335.

³ *Succession of Frantum*, 3 Robin. (La.) 283, 286.

⁴ Even though the ward may have in-

dicated their correctness: *Matter of Gill*, *supra*; *Newman v. Reed*, 50 Ala. 297, 301.

⁵ *Stell v. Glass*, 1 Ga. 475, 485.

⁶ *Owens v. Mitchell*, 38 Tex. 588.

⁷ *George v. Dawson*, 18 Mo. 407, 408; *McNabb v. Clip*, 5 Ind. App. 204, 206.

⁸ *Hendry v. Hurst*, 22 Ga. 312, 317.

⁹ Rev. St. 1890, § 6304.

The *onus* to prove the correctness of credits claimed by guardians in the settlement of their accounts is on them;¹ and it is held in Alabama that the mere production of a receipt purporting to be signed by the creditor, without proof of the signature and of the validity of the demand, is insufficient to authorize the allowance of the credit in an executor's settlement.² And so in North Carolina, where the statute makes vouchers presumptive evidence of disbursements, that they are so only when they state with reasonable particularity the purpose of them, on what particular account the disbursement was made, the time, etc., so as to show that the expenditure was a proper one.³ No vouchers are necessary for the allowance of commissions on disbursements; of these the court takes notice from the showing of the record.⁴ But if circuitry of action can be avoided by the allowance of claims for credits, without injustice to any one, it would be unreasonable to subject the parties to additional expense by insisting on technical objections.⁵ The inadvertent omission of a small item in the guardian's account, without intention of gain to the guardian or injury to the ward, establishes neither actual nor constructive fraud.⁶

Onus probandi
on guardian.

Receipt must
be proved,

and refer to
ward's liability
with reason-
able certainty,

but should not
be unreason-
ably objected
to.

Where an accounting which has been examined and allowed by the ordinary is attacked on final settlement, the objections should point out specifically the items attacked and the ground on which the objection is based.⁷

Objections
should be
definite.

Where a guardian takes possession of his ward's land and cultivates it, instead of leasing it to another, he is to be held liable on final settlement with his ward for the difference between the fair rental value of the land and the aggregate amount of expenses allowed him by the court.⁸ It is a question for the jury whether a guardian is chargeable for a sum of money payable to her personally under a policy of life insurance, but with which she charged herself in her first annual settlement as guardian.⁹

Guardian oc-
cupying
ward's land
liable for
difference
between rental
value and
amount of
expenses.

¹ Hutton v. Williams, 60 Ala. 133, 138; Stanley v. Deihough, 50 Ark. 201, 204; Gregg v. Gregg, 15 N. H. 190, 193.

² Gaunt v. Tucker, 18 Ala. 27, 29; Pearson v. Darrington, 32 Ala. 227, 262.

³ McLean v. Breese, 109 N. C. 564, 566.

⁴ Newman v. Reed, 50 Ala. 297, 300.

⁵ Cutts v. Cutts, 58 N. H. 602, 604.

⁶ Purslow v. Brune, 43 Kans. 175.

⁷ Bonner v. Evans, 89 Ga. 656, 659.

⁸ Taylor v. Taylor, 19 S. W. (Ky.) 528.

⁹ State v. Miller, 44 Mo. App. 118, 121.

To one who is executor or administrator of a decedent, and guardian to the decedent's legatee or distributee, it is indifferent whether he be chargeable with a legacy or distributive share in his character as executor or as guardian. He is liable in either capacity. But he is not liable in both; hence, the question is an important one to his sureties on the respective bonds. The law in such case is announced to be, that he is not liable on the guardianship bond until he has made final settlement of his administration account.¹ Where, in such case, the guardian has paid out for the support of his ward more than he received as guardian, it was held that the excess should be credited on his executor's account, as paid over to himself as guardian;² and so if he charge himself as guardian with the share due to his ward as legatee, the liability as executor is thereby extinguished.³ If he fail to charge himself as guardian, it is a breach of the guardian's bond.⁴ So where a guardian succeeds himself in a new fiduciary relation, if he is clearly entitled to the trust fund in the new relation, he may elect to so hold it, and if he does so by some affirmative, unequivocal act, he will from that time be required to account in his new trust relation.⁵ But if the fiduciary be insolvent, he cannot transfer his mere indebtedness in one capacity to himself in another capacity, so as to exonerate his sureties in one, and throw the burden upon those in the other capacity. To make the transfer valid, it must in such case consist of substantial assets.⁶ If the guardian makes default, he and his sureties are liable on his guardianship bond, because it was the guardian's duty to collect from the administrator, the same being collectible, and his neglect to do so is a breach of the bond; and although the ward might collect the debt from the

Executor who is also guardian is not liable on guardianship bond until he has settled as executor.

If he has paid out as guardian in excess of income, he takes credit as executor.

If one succeed himself in a new trust relation, he may elect to hold in the new capacity.

But if the fiduciary be insolvent, he cannot shift his indebtedness so as to affect his bondsmen.

¹ *Hall v. Cushing*, 9 Pickering, 395, 409, approved in *Conkey v. Dickinson*, 13 Metc. (Mass.) 51, 53.

² *Mattoon v. Cowing*, 13 Gray, 387, 390.

³ *Crenshaw v. Crenshaw*, 4 Rich. Eq. 14; *Simkins v. Cobb*, 2 Bailey, 60, 64; *Johnson v. Johnson*, 2 Hill Ch. 277, 284; *Myers v. Wade*, 6 Rand. 444, 447; *Alston v. Munford*, 1 Brock. 266, 277.

⁴ *State v. Tunnell*, 5 Harring. 94.

⁵ *Tittmann v. Green*, 108 Mo. 22, 33; *State v. Branch*, 112 Mo. 661, 668; *Harrison v. Ward*, 3 Dev. 417; *Potter v. Ogden*, 136 N. Y. 384.

⁶ *Tittmann v. Green*, *supra*; *Gilmer v. Baker*, 24 W. Va. 72, 92; *Smith v. Gregory*, 26 Gratt. 248.

sureties of the administrator, yet she has her election to sue either set of sureties, or both; and the guardian's sureties will be subrogated to the ward's rights and pursue any equities they may have against the administrator's sureties.¹ Nor can a guardian charge or be allowed for counsel fees paid for assistance and advice as guardian, when he has already been allowed for professional advice to him as executor, and the situation of the estate calls for no additional or distinct and independent employment of counsel for the guardian.²

Cannot charge for counsel fees in double capacity.

A guardian, who is also one of the executors of the estate of the ward's deceased father, should be careful to avoid commingling the funds of his ward with those of the estate; and if he has allowed such commingling, and his accounts as guardian are confused with those as executor, the court is warranted in finding that the minor heirs had been supported from the funds of the estate, and that insurance money collected for the wards had been kept intact for their use.³

Executor, who is also guardian, should carefully keep accounts separate.

If a question of fraud arises as an incident to the accounting, it is the duty of the Probate Court to try it, in the same manner as any other question of fact.⁴

Court must try questions of fraud.

§ 103. What the Guardian is liable for in his Final Accounting. — The guardian should charge himself for all the estate of the ward that came to his hands at any time, whether inventoried or not, in so far as he has not already accounted for the same; and is liable for all estate of his ward, that he might have collected or reduced to possession by the exercise of proper diligence and prudence.⁵ Thus he is responsible for estate of his ward that came to him, though from another State,⁶ for the nominal value of debts which it was his duty to collect, unless he shows, at the final accounting, that they were not collectible at the time when they ought to have been collected.⁷ He is liable on his bond for the amount which he ought to have collected for his ward in money, but for which he took his own bond instead;⁸ and for the loss of

Guardian is liable for all estate of his ward that came, or ought to have come, into his hands.

¹ Harris v. Harrison, 78 N. C. 202.

² Withers v. Withers, 4 La. 134.

³ Hill v. Smith, 8 Wash. 330.

⁴ Wade v. Lobdel, 4 Cush. 510.

⁵ As to the liability incurred and degree of diligence and prudence required of guardians, see ante, §§ 60-67.

⁶ McDonald v. Meadows, 1 Metc. (Ky.) 507.

⁷ Seigler v. Seigler, 7 S. C. 317, 324; Coggins v. Flythe, 113 N. C. 102, 114.

⁸ State v. Womack, 72 N. C. 397.

a legacy to his ward directly attributable to his want of business judgment.¹ So the guardian is liable for the difference between the reasonable rent of his ward's property and the reasonable value of necessary improvements made by him;² and where he allows the administrator of an estate, in which his ward was interested, to take charge of the real estate, he is liable to his ward for the rents, not used by the administrator in the payment of debts, up to the time the land was sold to pay decedent's debts.³

Failure on the part of a guardian to charge himself with the receipt of money belonging to his ward, or to make any disclosure of the fact of his having received it, in his report or accounting to the court, constitutes a conversion of the fund to his own use, for which he is liable on his bond.⁴ So the guardian is liable on his bond for the price of land of his ward sold by him for payment of which he accepted his own indebtedness to the purchaser;⁵ and for the full amount of all debts due the ward from third persons, in discharge of which he accepted his own indebtedness.⁶ The conversion of trust funds by a guardian, as, for instance, using his ward's money in his own business and the like, is made a penal offence by statute in some States, and punished like grand larceny.⁷ But the omission by inadvertence or mistake to charge himself with an amount collected for the ward, not made with the intention to defraud or injure him, and where the guardian gains no pecuniary advantage thereby, constitutes neither actual nor constructive fraud.⁸

Where a guardian has, under authority of court, bid in property sold under a deed of trust in favor of the ward, and taken the title in his own name, and afterwards mortgages such property to secure his individual indebtedness, he commits waste, for which he and his sureties are liable on the guardianship bond.⁹

¹ Stotthoff v. Reed, 32 N. J. Eq. 213; Pierce v. Prescott, 128 Mass. 140, 145.

² Taylor v. Calvert, 37 N. E. (Ind. Sup.) 531.

³ Coggins v. Flythe, 113 N. C. 102.

⁴ Asher v. State, 88 Ind. 215, 219.

⁵ Heflin v. Bevis, 82 Ind. 388.

⁶ Baughn v. Shackelford, 48 Miss. 255,

265; Pfeiffer v. Knapp, 17 Fla. 144, 154; Manning v. Manning, 61 Ga. 137, 140.

⁷ So, for instance, in Minnesota: St. 1891, § 6403; Missouri: Rev. St. 1889, § 3555; New York: Pen. Code, § 541.

⁸ Purslow v. Brune, 43 Kans. 175.

⁹ State v. Tittmann, 54 Mo. App. 490, 495; s. c. 35 S. W. 579.

The theory upon which guardians are held liable for interest payable to their wards has been fully discussed in connection with the guardian's duties in the management of his ward's estate.¹ In the absence of evidence to the contrary, the presumption is that the guardian could have loaned the ward's money; and where the receipts were always in excess of the expenditures he will be held liable for interest;² and so the guardian is liable for interest, where she is allowed compensation for the ward's support.³ The burden is on the guardian to show, that it was impracticable for him to safely loan out the funds of his ward in the manner required by the statute;⁴ but courts will take judicial notice of the history of a State when in a condition of very great pecuniary embarrassment and insolvency, so that it may have been impracticable for a guardian to make a safe loan of a large sum of money, without some delay, after its receipt,⁵ and he cannot be charged with interest on the surplus funds in hand not loaned out, unless he is shown to have been guilty of culpable negligence in not lending them out.⁶ And the annual settlements approved by the court are *prima facie* evidence that the guardian has satisfactorily accounted for the failure to loan his ward's money.⁷

Presumption is that the guardian could have loaned out money.

Burden of proof on guardian to show the contrary.

courts will

Courts take judicial knowledge of public embarrassment during war.

Approval of settlement *prima facie* evidence that money could not be loaned.

It appears from what has already been stated in connection with the guardian's duty in the investment of his ward's funds⁸ that he is liable for the loss of the fund if due to his negligence and inadvertence; the guardian's account may be charged with such loss by the Supreme Court of Probate on appeal from the Court of Probate.⁹

Guardian liable for loss of fund through his negligence.

Where the guardian has failed in his accounting to charge himself with rent due his ward, which had been agreed by the parties in interest to be offset against an item for the keeping of the ward, both items should be stricken from the account.¹⁰

Rents may be set off against charge for support.

¹ *Ante*, § 67.

² *Steyer v. Morris*, 39 Ill. App. 382, 386.

³ *Jacobia v. Terry*, 92 Mich. 275.

⁴ *Brand v. Abbott*, 42 Ala. 499, 501; *Thompson v. Thompson*, 92 Ala. 545, 549.

⁵ *Ashley v. Martin*, 50 Ala. 537, 540.

⁶ *Ashley v. Martin*, *supra*.

⁷ *Thompson v. Thompson*, 92 Ala. 545, 549.

⁸ *Ante*, § 63.

⁹ *Kimball v. Perkins*, 130 Mass. 141, 143.

¹⁰ *Henning v. Eldridge*, 38 Ill. App. 551.

If the guardian has failed to collect a pension, which his successor may collect, he should not be charged with the uncollected amount;¹ nor should he be charged with the uncollected amount of pension in the hands of the government at the time of his ward's death.²

Not chargeable with pension which successor may collect.

Joint guardians are not jointly nor severally liable for money that has come to the hands of any one of them, unless they are chargeable with negligence. Hence, where joint guardians in affluent circumstances, and in good repute, apportion the custody and management of the property to suit the capacity and qualifications of each, but without surrendering the right of each to intermeddle with the whole, each is chargeable with no more than he received, unless he stood supinely by while his co-guardian was manifestly impairing the estate.³

Joint guardians liable severally for property received by each.

§ 104. **Credits for Support and Education of Wards.** — The law regulating the duties and powers of guardians in respect of the support and education of their wards is discussed in a former chapter.⁴

It appears from what is stated there, that where the father is able to maintain and educate his child out of his own means, there will be no allowance to the guardian for such purpose; hence, where a father has property of his infant child in possession, and has not, during his lifetime, applied to the court to appropriate the child's property for its education or support, nor made any charges to the child, his estate will be allowed nothing for such support without the clearest proof that justice requires it.⁵ To justify the allowance of credits in the guardian's settlement for expenditures in the maintenance of a ward who has parents living, there must be a preceding order of the court having jurisdiction allowing the expenditure.⁶ But where neither the mother,

No allowance for support to guardian if ward have father living,

unless there is an order to that effect by the court.

¹ *Mattox v. Patterson*, 60 Iowa, 434, 437.

² *Mattox v. Patterson*, *supra*.

³ *Jones' Appeal*, 8 Watts & S. 143, 147.

⁴ *Ante*, §§ 47-51 incl. See also § 9, treating of the duties of parents in this respect.

⁵ *Evans v. Pearce*, 15 Gratt. 513; *Griffith v. Bird*, 22 Gratt. 73, 80; *Stigler v. Stigler*, 77 Va. 163; *Walker v. Crowder*, 2 Ired. Eq. 478, 487; *Buckly v. Howard*,

35 Tex. 565, 576; *Welch v. Burris*, 29 Iowa, 186.

Similarly, if ward be supported by a brother, who has demanded no compensation, the guardian will not be allowed credit for voluntary payment to such brother: *In re Eschrich*, 85 Cal. 98, 100.

⁶ *Darter v. Speirs*, 61 Miss. 148; *Ex parte George*, 63 Miss. 143, holding, under a statute requiring such order of court, that the Chancery Court cannot allow such expenditures, even though it be shown

having remarried after the father's death, nor the step-father, is liable for a minor's maintenance, it is held in some States that a guardian may be allowed for necessary expenses incurred in the support and education of a minor ward, though no previous order has been made therefor by the court; and this whether the expenses were previous or subsequent to the appointment.¹ But the guardian is not entitled to credit for such expenditures unless he show that the ward had no parents able to provide therefor, or were unwilling to do so;² nor where the guardian has placed himself *in loco parentis* to his ward, treating her as one of his family.³ A guardian who is a merchant may, if he acts in good faith, supply the necessary wants of his ward from his own store, charging a reasonable profit thereon.⁴ A guardian should not be allowed compensation for boarding, clothing, and tuition, if the ward's services equalled or exceeded their value;⁵ but may be allowed for boarding his ward, and a reasonable compensation for furnishing him a horse, if it was needed and proper for the use of the ward, unless gratuitously supplied.⁶

In some States credit allowed on full proof of facts authorizing such order.

Guardian may furnish necessities out of his own store.

No credit for support, if minor render services.

A guardian cannot receive credit in his accounting for the advance of money to his ward, to set him up in business, or for other purposes, without applying to the court for leave;⁷ but the previous allowance by the court is in some States to be inferred from the approval of annual accounts by the Probate Court.⁸ And, as has been previously remarked,⁹ if the guardian has done that, which the Chancellor would certainly have directed if applied to beforehand, there seems to be no good reason why the guardian should be made to forfeit his claim to an allowance for necessary, proper, and economical disbursements for the benefit of his ward, on the ground merely that he had made them without asking

No credit for money paid to set up ward in business;

but allowance by court may be inferred from approval of account.

Credit allowed on proof of such facts as would induce the Chancellor to make the order.

that the expenditures were entirely proper, and that such order would have been made if asked for, without a preceding order.

¹ *Matter of Besondy*, 32 Minn. 385, 387; *Matter of Bostwick*, 4 Johns. Ch. 100, 102; *Bond v. Lockwood*, 33 Ill. 212, 223.

² *State v. Roche*, 94 Ind. 372, 378.

³ See, as to persons *in loco parentis*, ante, § 13.

⁴ *Moore v. Shields*, 69 N. C. 50.

⁵ *Kidd v. Guibar*, 63 Mo. 342, 344.

⁶ *Owen v. Peebles*, 42 Ala. 338, 344.

⁷ *Shaw v. Coble*, 63 N. C. 377; *Mells, in re*, 64 Iowa, 391.

⁸ *Cook v. Rainey*, 61 Ga. 452; *Rolfe v. Rolfe*, 15 Ga. 451, 457.

⁹ *Ante*, § 50.

the previous direction of the Chancellor. But in such case his disbursements should be rigidly scrutinized, and only such be allowed which the judge, exercising a sound and prudent discretion, would have directed.¹ A grandmother in humble circumstances, guardian of an infant having a separate estate, was allowed to offset her reasonable charges for maintaining and educating her ward against the claim of the ward's heirs for the money belonging to the ward, although the guardian had neither charged herself with said money, nor taken credit for such support and education, no evidence appearing that she took her grandchild *in loco parentis*.²

Under a statute requiring the court, where it appears that the profits of an orphan's estate are not sufficient for his education and maintenance, to bind out such orphan for the whole or such part of his minority as may be deemed best, it was held that in such case it is the duty of the guardian to report such fact promptly to the court, and to abstain from paying out anything to the use of the ward until the court has failed or refused to bind him out, except for mere necessities; but for disbursements for necessities before appointment as guardian, he should be allowed credit in his accounting.³ But it is not necessary that the guardian should make a specific report in such case; it is enough that the condition of the estate appear from the general return.⁴

§ 105. **Credits for Disbursements in the Management of the Estate.** — The guardian is entitled to be reimbursed for costs and counsel fees paid by him for professional advice, and for prosecuting and defending suits in the ward's interest necessary in the legitimate business of the ward's estate;⁵ but before the allowance can be made, it must appear that the compensation was reasonable and proper,⁶ in a suit prosecuted in good faith, on competent advice,⁷

¹ Withers v. Hickman, 6 B. Mon. 292, 295.

² Lafferty's Estate, 147 Pa. St. 283.

³ Rolfe v. Rolfe, 15 Ga. 451, 456; Smith v. Hilly, 29 Ga. 582.

⁴ Rolf v. Rolf, 20 Ga. 325, 327.

⁵ McEhenney's Appeal, 46 Pa. St. 347, 349; Ashley v. Martin, 50 Ala. 537, 545; Brown v. Mullins, 24 Miss. 204, 207;

McWilliams v. McWilliams, 15 La. An. 88; Royston v. Royston, 29 Ga. 82, 101.

⁶ Holcomb v. Holcomb, 13 N. J. Eq. 415; Alexander v. Alexander, 8 Ala. 796, 799. But it was held, in this case, on a motion to that effect, that the Chancellor may determine the value of counsel fees in his own court: p. 806.

⁷ Smith v. Bean, 8 N. H. 15, 19; Mathes v. Bennet, 21 N. H. 204, 217.

and that it has been actually paid.¹ The right to have credit for counsel fees allowed extends to the fees paid to counsel for preparing the final settlement, or stating the account, and for advice, if there be any difficulty connected with it,² as well as for defending the guardian on final accounting, if the account is unjustly assailed;³ but not if the controversy was in great measure occasioned by the guardian's fault.⁴ So in respect of expenses incurred in resisting the application of an insane person for revocation of guardianship on the ground of restoration to sanity; these are to be allowed if incurred in good faith, and when there is reasonable doubt as to the ward's condition.⁵ The court has no power to allow a guardian attorney's fees for prosecuting against his ward an unfounded claim.⁶ The question, whether the employment of counsel was a reasonable and proper exercise of the guardian's discretion, is not determined by the test of success or failure; but whether a prudent man would, under all the circumstances, have judged the expenditure a proper or necessary one in the interest of the ward.⁷ But if the proof shows that counsel was employed, not to aid the guardian in making a fair settlement, but for services personal to the guardian, or to cover up a fraud, the fees paid the counsel should not be allowed.⁸

Extending to assistance in making final settlement.

Success is not the criterion to judge of reasonableness of the employment of counsel.

It was held in New York that a guardian cannot charge for services rendered to his ward as attorney and counsellor at law.⁹ But a guardian was allowed compensation for his own services in procuring a pension for the ward, so far as such services were such as the pensioner would himself have done if able.¹⁰ The statutory

In New York.

Payment for guardian's personal services.

¹ *Modawell v. Holmes*, 40 Ala. 391, 405, referring to *Bates v. Vary*, 40 Ala. 421, 441.

² *State v. Foy*, 65 N. C. 265, 274; *Matter of Hollingsworth*, 45 La. An. 134, 146.

³ *State v. Foy*, *supra*; *Voëssing v. Voëssing*, 4 Redf. 360, 368; *Dearborn v. Patton*, 64 N. H. 568; *Coggins v. Flythe*, 113 N. C. 102, 115.

⁴ *Blake v. Pegram*, 109 Mass. 541, 558; *Rawson v. Corbett*, 150 Ill. 466, 478; *Steyer v. Morris*, 39 Ill. App. 382.

⁵ *Palmer v. Palmer*, 38 N. H. 418.

⁶ *Smyth v. Lumpkin*, 62 Tex. 242.

⁷ *Caldwell v. Young*, 21 Tex. 800.

⁸ *Johnston v. Haynes*, 68 N. C. 509, 512, and see cases *supra*.

⁹ The decision seems to rest upon a provision of statute. The reasoning is not reported; but the syllabus recites, that "neither an order of a surrogate, before the services are rendered, directing the performance thereof, and fixing the extra compensation, nor an order ratifying and allowing it, will legalize the charge: *Morgan v. Hannas*, 49 N. Y. 667.

¹⁰ *Southwick v. Evans*, 17 R. I. 198.

lien given in Colorado to attorneys and counsellors at law, upon money or property in their hands, or judgments obtained by them, extends to judgments which become parts of trust estates, and may be enforced directly against such trust estate, without first obtaining judgments against the guardians.¹

Counsel fees are not to be allowed a guardian, which he paid under a contract of retainer for himself and co-tenants in common, to support the interest of himself and co-heirs, the payment being made in part by the accounts due by the counsel to the ancestor; nor when such contract was entered into before the guardian's appointment as such, and when the minors' interests were represented by the ancestor's administrator; nor for the appointment of counsel to represent the minors in the final settlement of the ancestor's estate, not necessary to protect the interest of the wards.²

The estates of minors are self-evidently subject to all liabilities properly incurred in the course of the guardian's judicious management of it.³ While the law may forbid compensation for the guardian's personal services, in excess of the fixed rate of commissions, yet he is entitled to credit for all proper expenses incurred by the employment of a clerk or agent, where, from the nature or situation of the property, it was beneficial to subject it to the extra expense.⁴

So a guardian, though it is advisable that he should, whenever practicable, act under the direction of the court in discharging incumbrances on the lands of the minor, yet he may, without the direction of the court, pay a deed of trust or mortgage upon the land which, if unredeemed, would probably destroy the ward's interest.⁵ And where a lunatic is indebted to his committee (for a debt accrued prior to the committee's appointment) it is proper to include such debt in the settlement of accounts.⁶ So where the guardian has charged himself with the collection of rents for his ward, and a part of such rents were not paid in money, but by deducting from

¹ Fillmore v. Wells, 10 Colo. 228, 231.

² Chapline v. Moore, 7 T. B. Mon. 150, 163, 164, 167.

³ Owens v. Mitchell, 38 Tex. 588.

⁴ Vanderheyden v. Vanderheyden, 2 Paige, 287, referring to McWhorter v. Benson, 1 Hopk. Ch. 28, 34.

⁵ Wright v. Comley, 14 Ill. App. 551, 553; Cheney v. Roodhouse, 135 Ill. 257, 264.

⁶ "For how else was the committee to proceed?" Carter v. Edmonds, 80 Va. 58, 61.

the amount due by the tenant an amount due to the tenant by the ward, such amount should be credited to the guardian.¹

A testamentary guardian residing in another State is entitled to credit for the expenses of removing the ward to his own domicil, although the court had made no order for such expenses.² It seems to be reasonable and proper that a guardian, who advances his own money for necessary expenses of his ward, should be entitled to interest thereon,³ although the general policy of the law is adverse to the allowance of interest, either to an agent or trustee, for advances made.⁴ So the payment of interest and principal, to keep down an incumbrance of the ward's estate, and also for taxes, should be allowed, although made without order of court.⁵

Expense for removing ward from one State to another allowed.

Interest for advancements by guardian.

Where the guardian refuses to deliver property to her ward, for the purchase price of which she asks credit in her account, the credit should be disallowed.⁶

Credit disallowed for purchase of articles not turned over.

A guardian, who, with the consent of his ward when of age, extended the time of payment of a security in his hands belonging to the ward, and agreed in good faith to pay a charge of ten per cent for the guaranty of a third person, will be allowed said charge of ten per cent in the settlement of his account.⁷

§ 106. **Compensation for Guardians' Services.** — Like executors, administrators, and other trustees, guardians are not allowed compensation, in England, for their services, either at law or in equity.⁸ But "the state of our country, and the habits of our people, are so different as to have induced the legislatures of nearly all the States to introduce provisions by statute for competent remuneration to those to whom the law commits the charge and care of the estates of infants and deceased persons."⁹ Hence, from the earliest times, courts have been empowered and directed to allow guardians, having faithfully discharged the trust imposed upon them, and prudently managed the estates of their wards, such

Guardians not entitled to compensation at common law.

Otherwise in the United States.

¹ *Brewer v. Ernest*, 81 Ala. 435, 439; to similar effect: *McNeil v. Hodges*, 83 N. C. 504.

² *Cummins v. Cummins*, 29 Ill. 452.

³ *Hayward v. Ellis*, 13 Pickering, 272, 278.

⁴ *Evarts v. Nason*, 11 Vt. 122, 128.

⁵ *Wright v. Comley*, 14 Ill. App. 551.

⁶ *Pierce v. Prescott*, 128 Mass. 140, 148.

⁷ *Burnham v. Dalling*, 18 N. J. Eq. 132.

⁸ *Woerner on Adm.* § 524.

⁹ Per Ruffin, Ch. J., in *Boyd v. Hawkins*, 2 Dev. Eq. 329, 334.

compensation as to the court may seem reasonable and just.

Compensation in discretion of courts. In many States the discretion of the court is unlimited in this respect by any express language of the

statute, among which we may name Arizona,¹ Arkansas,² California,³ Idaho,⁴ Illinois,⁵ Iowa,⁶ Kansas,⁷ Kentucky,⁸ Massachusetts,⁹ Michigan,¹⁰ Missouri,¹¹ Montana,¹² New Hampshire,¹³ Rhode Island,¹⁴ Tennessee,¹⁵ Utah,¹⁶ Washington,¹⁷ Wisconsin,¹⁸ Wyoming,¹⁹ and probably other States. In Colorado the court is not allowed to fix the compensation at a rate exceeding that allowed to executors and administrators.²⁰ In Georgia²¹ and South Carolina²² the allowance is to be the same as for executors and administrators.²³ In Alabama²⁴ the compensation

Fixed by statute.

is fixed by statute at an allowance of a commission of $2\frac{1}{2}$ per cent on the disbursements, and $2\frac{1}{2}$ per cent on receipts, special extra services to be allowed for, if just; but such extra services, as well as all expenses, are to be allowed only on an itemized account to be furnished by the guardian and verified by affidavit. The loaning out of money by a guardian is not such "extra" service as entitles him to extra compensation;²⁵ nor is the guardian allowed $2\frac{1}{2}$ per cent commissions on amounts which he is ordered to disburse, but has not yet disbursed.²⁶ In Louisiana the tutor is allowed a commission of 10 per cent on the annual revenue of the ward's estate,²⁷ held to mean the net yield of crops,²⁸ or earnings accruing to the minor through the care and labor of the tutor, but not on amounts derived from sale or inheritance;²⁹ payable to the natural as well as the appointed tutor.³⁰

¹ Rev. St. 1887, § 1349.

² Sand & Hill's Dig. & St. 1894, § 3640.

³ Deering's C. C. Proc. 1885, § 1776.

⁴ Rev. St. 1887, § 5796.

⁵ St. & Curt. Ann. St. 1896, ch. 64, § 42.

⁶ McClain's Ann. Code, 1888, § 3447.

⁷ Gen. St. 1889, § 3241.

⁸ Campbell v. Golden, 79 Ky. 544, 546.

⁹ Publ. St. 1882, ch. 144, § 7.

¹⁰ How. Ann. St. 1882, § 6338; Gott v. Culp, 45 Mich. 265, 274.

¹¹ Rev. St. 1889, § 5334.

¹² Comp. St. 1888, Prob. ch. xiv. § 375.

¹³ Publ. St. 1891, ch. 177, § 5.

¹⁴ Publ. St. 1882, ch. 168, § 36.

¹⁵ Matlock v. Rice, 6 Heisk. 33, 37.

¹⁶ Comp. L. 1888, § 4330.

¹⁷ 1 Hill's St. & C. 1891, § 1151.

¹⁸ Sanb. & Berryman St. 1889, § 3993.

¹⁹ Rev. St. 1887, § 2273.

²⁰ Mills' Ann. St. 1891, § 2089.

²¹ Code, 1882, § 1834; Burney v. Spear, 17 Ga. 223, 225.

²² Rev. St. 1894, § 2177.

²³ See Royston v. Royston, 29 Ga. 82, 103; Cartledge v. Cutliff, 29 Ga. 758, 769; Booth v. Sineath, 2 Strobb. Eq. 31; Ex parte Witherspoon, 3 Rich. Eq. 13.

²⁴ Code, 1887, § 2466.

²⁵ Allen v. Martin, 36 Ala. 330, 332; Neilson v. Cook, 40 Ala. 498, 512.

²⁶ Allen v. Martin, 34 Ala. 442.

²⁷ Voorhis Civ. C. 1889, Art 349.

²⁸ Succession of Hargrove, 9 La. 505.

²⁹ Matter of Hollingsworth, 45 La. An. 134, 145.

³⁰ McMichael v. Raoul, 14 La. An. 307.

In Maryland,¹ guardians of minors are allowed a commission not exceeding 10 per cent of the annual income, and committees of insane persons not exceeding 10 per cent on income and expenditures of the estate. In Texas, a commission of 5 per cent on all sums received, or disbursed in cash, but not including the money on hand at the time of appointment.² In Nebraska³ commissions are allowed at the rate of 5 per cent on \$1000 or under; 2½ per cent on sums over \$1000 and under \$5000; 1 per cent on all sums over \$5000, and reasonable compensation for extra services. And in New Jersey⁴ a commission of 7 per cent on sums not exceeding \$1000; on sums exceeding \$1000 and not exceeding \$5000, 4 per cent; on sums over \$5000 and not exceeding \$10,000, 3 per cent, and on all sums exceeding \$10,000, 2 per cent. If compensation is directed by will, it is deemed to be in full of the guardian's services, unless he renounce his legacy.⁵

As a general rule courts will not permit a trustee to break in on the corpus of a trust fund, or sanction expenditures beyond the income of the estate; but if, from circumstances which do not result from the fault of the trustee, there be no income or interest out of which

If necessary, compensation may be paid out of principal.

the trustee can obtain compensation, he may receive payment out of the principal.⁶ The true principle according to which courts should allow compensation to guardians is held to be to secure adequate reward according to the circumstances of the case; the court is not limited to the allowance of the commissions on the gross income, but may, where justice requires it, allow extra compensation for personal services rendered,⁷ provided the whole does not exceed a just compensation.⁸ Where the fund in the guardian's hands is small, the interest thereon may be allowed him in lieu of compensation.⁹

Theory of compensation is to secure adequate reward for services.

In New York, under a statute authorizing the Court of Chancery to make a reasonable allowance to guardians, execu-

¹ Publ. Gen. L. 1888, Art. 93, § 177; *Whyte v. Dimmock*, 55 Md. 452, 455.

² Sayles' Civ. St. 1888, Art. 2698; *Reed v. Timmins*, 52 Tex. 84, 91.

³ Comp. St. 1891, § 284.

⁴ Rev. St. 1877, p. 776, § 110; *Warbass v. Armstrong*, 10 N. J. Eq. 263.

⁵ Rev. St. 1877, p. 776, § 111.

⁶ *Burney v. Spear*, 17 Ga. 223, 225.

⁷ *May v. May*, 109 Mass. 252, 258; *Dixon v. Homer*, 2 Metc. (Mass.) 420, 422.

⁸ *Rathbun v. Colton*, 15 Pickering, 471, 485; *Emerson, Appellant*, 32 Me. 159.

⁹ *Mattox v. Patterson*, 60 Iowa, 434, 438.

Rate of commissions in New York.

tors, and administrators, on settlement of their accounts, for their services, over and above their expenses, the Chancellor, by general rule, established the following rate: 5 per cent on all sums received and paid out (*i. e.* $2\frac{1}{2}$ per cent for such sums received, and $2\frac{1}{2}$ per cent for such sums paid out) on sums not exceeding \$1000; $2\frac{1}{2}$ per cent on any excess between \$1000 and \$5000, and 1 per cent for all above \$5000; and he held the committee of a lunatic to be within the equity of the statute.¹ In the trial of a case in the Supreme Court it was held that this rule of compensation does not cover the entire field of service and duty of the guardian, nor deny him remuneration for personal services outside of his specific trust,² but the

No compensation for extra-services in New York.

Court of Appeals, in a later case, held the contrary, denying compensation to an attorney and counsellor-at-law for professional services rendered in the affairs of his ward.³ In other States compensation for the per-

Secus in other States.

sonal services of the guardian has been allowed;⁴ and it has been held that the compensation ought to be graduated to the responsibility incurred, the amount of the estate, and the sum of the labor expended; and that even awarding it in a gross sum is preferable to the adoption of a uniform rate in the shape of commissions.⁵ And it was held in Pennsylvania, that a guardian is entitled to compensation for personal services rendered to the ward's estate, notwithstanding an agreement with the father of the wards that the latter should collect and receive the wards' estate, manage and invest the same, and that the guardian should charge no commissions except on the trust funds which might pass into his hands in the event of the death of the father.⁶ So a guardian, who has loaned the money of his ward to a manufacturing company of which the guardian was a member, and whose ward elected to share in the profits of said company instead of interest on his money, was held entitled to compensation (one third of such profits) for his services in managing the business for his ward's estate.⁷

¹ Matter of Roberts, 3 Johns. Ch. 42.

² Morgan v. Morgan, 39 Barb. 20, 36, reviewing cases *pro* and *con*.

³ Morgan v. Hannas, 49 N. Y. 667; see same case, *ante*, § 105.

⁴ Longley v. Hall, 11 Pickering. 120, 124; Emerson's Appeal, 32 Me. 159; Knowlton v. Bradley, 17 N. H. 458, 460.

⁵ In the Matter of Harland, 5 Rawle, 323, 330; Gott v. Culp, 45 Mich. 265, 274; May v. May, 109 Mass. 252, 257; Walton v. Erwin, 1 Ired. Eq. 136, 141.

⁶ Williams' Appeal, 119 Pa. St. 87, 90.

⁷ Estate of Small, 144 Pa. St. 293, 297.

Commissions are allowed to guardians for the performance of duties imposed on them by law; but for neglect of those duties, for mismanagement of the property of the wards, for the perpetration of positive wrong and injustice, the law awards no compensation; hence, no commissions are allowable to one who has mismanaged the estate.¹ So where one who has taken possession of an estate by virtue of being appointed guardian converts it to his own use, and when called on to account denies the existence of the trust, contests the title of her ward and claims as her own the property of the ward, she will not be entitled to compensation.² So the failure to file periodical accounts as required by statute operates, in some States, to the forfeiture of compensation to the guardian,³ unless it is made to appear to the judge that the omission was occasioned by sickness or unavoidable accident.⁴ But a Maryland case holds that where the guardian has performed his duties in a trust of considerable duration, except in the failure to pass his accounts regularly, and who has answered promptly, rendered a general account, and thrown no obstacles in the way of investigation, his commissions should not be reduced for the failure to file regular accounts.⁵ So compensation has been refused for taking care of a ward's fund which the guardian himself had borrowed,⁶ or which has been employed in the business of a firm of which he is a member;⁷ but where the annual reports are made with strict punctuality and fairness for a number of years, so that it might be seen at all times in what sums he was liable to his wards, and where he and his sureties are perfectly responsible, the use of the wards' funds by the guardian was held not such gross malfeasance as to preclude him from the right to be allowed commissions.⁸

The charges for compensation may be made from time to time as it is earned.⁹ But it should be observed that in passing

¹ Reed v. Ryburn, 23 Ark. 47, 50; State v. Richardson, 29 Mo. App. 595, 603.

² Vaughan v. Christine, 3 La. An. 328.

³ So provided by statute in some of the States. Trimble v. Dodd, 2 Tenn. Ch. 500, 502.

⁴ Starrett v. Jameson, 29 Me. 504, 507; Hume v. Warters, 13 Lea, 554, 558.

⁵ Magruder v. Darnall, 6 Gill, 269, 287.

⁶ Farwell v. Steen, 46 Vt. 678, 682; Burke v. Turner, 85 N. C. 500, 504.

⁷ Seguin's Appeal, 103 Pa. St. 139.

⁸ Carr v. Askew, 94 N. C. 194, 210.

⁹ Huffer's Appeal, 2 Grant's Cas. 341, 344; Snavely v. Harkrader, 29 Gratt. 112.

No commissions where guardian has mismanaged,

or failed to account,

or uses the ward's funds.

Commissions payable when earned. upon periodical accounts the investment or reinvestment of the fund in the hands of the guardian, for the purpose of producing an income therefrom, is not such a disbursement or paying out of the money as to entitle the guardian to commissions for paying out. Where the statute or rule of court distinguishes, in the allowance of commissions, between the receipt and the disbursement of funds, the guardian is to be allowed, on the passing of periodical accounts during the existence of the trust, the half commission upon all moneys received other than the principal from investments made by him; and also the half commission on amounts disbursed, other than the investment of the funds, leaving the residue of the commissions on the amount invested or undisbursed in hands for future adjustment.¹

No commissions on money paid to successor. Where the administration of the ward's estate has not continued during the ward's entire minority, full compensation is not to be made, nor full commissions allowed on the amount delivered or paid to the successor.² Nor

can commissions be allowed to one holding the position of executor and tutor at the same time, in both capacities.³ Perhaps the rule adopted in some States, of allowing one-half of the amount of commissions for the collection or receiving, and one-half for the disbursement of the funds will prevent injustice in cases where there is a change in the office of guardian without the fault of the retiring guardian.⁴ Thus, where the statute allots two and a half per cent for receiving, and a like amount for paying out the funds of a ward, the guardian is not entitled to the two and a half per cent *for paying out*, if he die with the fund in hand, on the theory that he has not, in such case, earned his commission.⁵ The justice of this view is apparent from the fact that the payment of such fund by the deceased guardian's administrator must be made to a new guardian to be appointed, who is entitled to *his* commission for paying it out to, or on account of, the ward. But it is

¹ Matter of Kellogg, 7 Paige, 265, 267.

² Where the retiring guardian has not been guilty of fraud or gross negligence, he is allowed by the statute of Alabama 2½ per cent on amounts not exceeding \$20,000, and 1 per cent on amounts beyond that: Code, 1887, § 2466.

³ Succession of Milmo, 47 La. An. 126, 131.

⁴ Matter of Roberts, 3 Johns. Ch. 43.

⁵ Floyd v. Priester, 8 Rich. Eq. 248, 251.

evident, that if the fund is paid to the ward herself by the deceased guardian's administrator, if she be legally competent to receive it, the estate of the deceased guardian is entitled to the commission for paying out, because in such case the commission has been fully earned, and the ward receives all that she would have received if the guardian had himself paid over the fund.¹ But it has been held in New York that where a guardian is allowed to resign on his own wish to be relieved from the duties of his trust, he should not only pay the costs of the petition and new appointment, but also transfer the funds in hand to his successor without commissions on the capital of the property.² And on the other hand, the rule allowing trustees, on discharging themselves, their commissions, although they transfer to the beneficiaries, or to new trustees, the identical stocks and securities which came to their hands originally,³ has been applied to guardians; so that a retiring guardian, in whose stead the ward, on reaching the age of fourteen, chose another guardian, was allowed commissions on the whole amount of the estate transmitted to the successor.⁴

Guardian resigning to pay costs and receive no commissions.

Entitled to full commission on ward's choosing a new guardian.

While the order of the Probate Court allowing commissions is not conclusive in the sense that it is not reviewable in a direct proceeding,⁵ yet the Appellate or Chancery Court will not disturb the allowance made by the Probate Court, unless manifestly excessive.⁶ In New Jersey it is said that upon the mere amount of an executor's commission, in the absence of fraud or mistake in fact or law, the Orphans' Court are the sole judges.⁷ The matter of compensation is left to the consideration of the court in passing the account, having nothing at all to do with the account as an item of it, and cannot in any case be considered by the jury.⁸

Allowance of commissions reviewable.

But will be disturbed for gross excess only.

Statutes, in some instances, make it the duty of courts having

¹ This view is emphasized by Johnston, Ch., dissenting from the majority in the case of *Floyd v. Priester*, *supra*, p. 252; and adjudged to be the law in the later case of *Adams v. Lathan*, 14 Rich. Eq. 304, 309.

² *Matter of Jones*, 4 Sandf. Ch. 615.

³ *Matter of De Peyster*, 4 Sandf. Ch. 511, 514.

⁴ *Phillips v. Lockwood*, 4 Dem. 299.

⁵ *Walton v. Erwin*, 1 Ired. Eq. 136, 138.

⁶ *Green v. Barbee*, 84 N. C. 69, 72, affirmed in *Wilson v. Lineberger*, 88 N. C. 416, 426; *Roach v. Jelks*, 40 Miss. 754, 757.

⁷ *Mathis v. Mathis*, 18 N. J. L. 59, 67.

⁸ *Gott v. Culp*, 45 Mich. 265, 274.

jurisdiction over guardians to adjust the proportionate amount of compensation due to each of several guardians of the same ward, having regard to the respective services rendered by each.¹

§ 107. **Effect of Settlements in pais and Acquittances by the Ward.** — The difference in the effect to be ascribed to transactions

Different effect of settlement between persons *sui juris* and between guardian and ward.

between persons *sui juris*, having never stood in the relation of guardian and ward, or other fiduciary capacity, on the one hand, and between a guardian and ward about the time of or recently after the ward's majority, on the other, is very evident, and has

given rise to widely different rules in measuring the validity of these transactions.² Parties in the former class, competent to protect themselves; under no disability; advised as to all circum-

Former have no right to protection against their carelessness;

stances by which they may be saved in their rights, or in a situation where they might, by due diligence, be so advised; not overreached by fraud, concealment, or misrepresentation; or the victims of a mistake

against which prudence might have guarded,—have no right to call upon courts of justice to protect them against the consequences of their own carelessness, and to disturb the peace of society by clamors for that justice which they have voluntarily or negligently

but the ward settling soon after majority with his guardian is presumed to have been overreached as to any prejudicial dealing of the guardian.

surrendered.³ On the other hand, transactions between guardian and ward, and particularly settlements made with the ward out of court, soon after the latter has reached majority, especially before the ward is in possession of his estate, are universally viewed by courts with a watchful and jealous eye.⁴ A presumption is raised, for the protection of the

¹ So, for instance, in New Jersey: Rev. 1877, p. 776, § 112. See, on the question of apportionment of compensation among several co-executors or co-administrators: Woerner on Adm. pp. 1162, 1170, *et seq.*

² Story Eq. Jurisp. §§ 318 *et seq.*, citing remarks of Lord Hardwick in *Hylton v. Hylton*, 2 Ves. 547, and of Lord Eldon in *Hatch v. Hatch*, 9 Ves. 292, 297; *Says v. Barnes*, 4 Serg. & R. 112, 114; *Forbes v. Forbes*, 5 Gill, 29, 39.

³ Per Dargan, Ch., in *Murrel v. Murrel*, 2 Strobb. Eq. 148, 154, citing earlier South Carolina cases; *McDow v. Brown*, 2 S. C. 95, 99, distinguishing between

"accounts stated," and "accounts settled," and refusing to open an account stated and settled, on the ground that the plaintiff possessed substantial information, at the time of the settlement, of the facts alleged as the ground for relief.

⁴ *Says v. Barnes*, *supra*; *Elliott v. Elliott*, 5 Bin. 1, 8; *Smith v. Davis*, 49 Md. 470, 489; *Wade v. Lobdell*, 4 Cush. 510, 512; *Stark v. Gamble*, 43 N. H. 465, 467; *Hall v. Cone*, 5 Day, 543, 548; *Adams v. Reviere*, 59 Ga. 793; *Condon v. Churchman*, 32 Ill. App. 317.

ward, continuing even after the termination of the guardianship until all matters between the guardian and ward have been settled, that all transactions and dealings between them, resulting prejudicially to the ward's interest, are constructively fraudulent, thus throwing the burden of proof on the guardian to show affirmatively that the ward had full knowledge of all the facts and acted by his free consent, in the absence of restraint or influence, and that the transaction was in good faith.¹ The distinction drawn by Chancellor Kent in *Kirby v. Taylor*² between a release to the guardian, and a gratuity, bounty, or donation to him, does not seem to command the assent of other courts; the reason of the rule is held fully as binding in one instance as in the other.³ The ordinary conclusive presumption, that all men know the law, does not apply in such cases, and the ignorance of the legal effect of a transaction is a complete answer to the objection of undue delay in the assertion of his rights by the ward.⁴ But while it is the policy of the law to require the final accounting of executors and administrators to be made in probate courts, this is not necessarily the case with guardians. It is obviously advisable for the guardian to do so, but it is not indispensable, unless so provided by statute. Aside from the guardian, no one is interested in the account but the ward; and if he, when of age, settles with the guardian, and gives him a receipt or release, and the settlement is a fair one, it is conclusive on the ward.⁵ This is in some States provided by statute, for instance in Dakota.⁶

Presumption that all men know the law is not applicable.

Settlements out of court not prohibited,

and are conclusive if honestly made.

The ordinary doctrine that mere receipts are of *prima facie* effect only, and may be explained, controlled, qualified, and con-

¹ *Gillett v. Wiley*, 126 Ill. 310, 326; *Huff v. Wolfe*, 48 Ill. App. 589; *Womack v. Austin*, 1 S. C. 421, 423; *Fish v. Miller*, Hoffm. Ch. 267; *Ferguson v. Lowery*, 54 Ala. 510, 513; *Harris v. Carstarphen*, 69 N. C. 416; *Long v. Long*, 142 N. Y. 545, 554; *Line v. Lawder*, 122 Ind. 548, 550; *Hawkins' Appeal*, 32 Pa. St. 263; *Meek v. Perry*, 36 Miss. 190; *Mulholland's Estate*, 154 Pa. St. 491, 498.

² 6 Johns. Ch. *242, 248.

³ *Waller v. Armistead*, 2 Leigh, 11, 14; *Ferguson v. Lowery*, 54 Ala. 510, 513.

⁴ *Voltz v. Voltz*, 75 Ala. 555, 568. To

similar effect: *Fridge v. State*, 3 Gill & J. 103, 115.

⁵ *Lukens' Appeal*, 7 Watts & S. 48, 54; *Roth's Estate*, 150 Pa. St. 261; *Davenport v. Olmstead*, 43 Conn. 67, 76; *McClellan v. Kennedy*, 8 Md. 230, 249; *Seward v. Didier*, 16 Neb. 58, 64; *Douglass v. Ferris*, 138 N. Y. 192, 200; *Ela v. Ela*, 84 Me. 423, 429; *Myer v. Rives*, 11 Ala. 760; *Satterfield v. John*, 53 Ala. 127, 131; *Steadham v. Sims*, 68 Ga. 741; *Lewis v. Browning*, 111 Pa. St. 493.

⁶ Rev. Code, 1895, § 2828.

Receipts by the ward may be explained or contradicted,

tradicted by parol evidence, is *a fortiori* applicable to receipts given by wards in settlement of the accounts of their guardians;¹ and so of a receipt given by a trustee who succeeds himself as curator.² Hence, if the receipt was given by accident, mistake, deceit, or fraud of any kind, or even in ignorance of the ward's rights, it will be disregarded;³ but it will

but are binding if made with full knowledge of ward's rights.

be held binding on the ward where it fairly appears that the ward dealt with his guardian with the full knowledge of his rights and all the facts, although being at the time in pressing need of money.⁴ So where a ward, after arriving at full age, has examined the guardianship account, and certified thereon its correctness, and his assent to its allowance, the decree of the Probate Court allowing the account is conclusive on the ward.⁵ One who has been under guardianship is bound by notice of the various proceedings and files in the Probate Court relating to his estate and to the transactions of his guardian as manifested in such proceeding; and he cannot claim that any fact concerning the guardianship accounts has been concealed from him, which he would have known if he had looked in the probate office.⁶

Where the statute, or the condition of the bond, requires final settlement to be made in the Probate Court,⁷ a settlement *in pais* with the ward is not a compliance with such requirement, and hence no answer to a citation requiring him to account;⁸ nor

¹ Beedle v. State, 62 Ind. 26, 31; Felton v. Long, 8 Ired. Eq. 224; Bennett v. Hannifin, 87 Ill. 31, 35; Sullivan v. Blackwell, 28 Miss. 737, 740; State v. Fenner, 73 N. C. 566.

² State v. Branch, 112 Mo. 661, 669.

³ Davis v. Hagler, 40 Kans. 187; Bruce v. Doolittle, 81 Ill. 103, 107; Musser v. Oliver, 21 Pa. St. 362; Le Bleu v. Timber Co., 46 La. An. 1465, 1470.

⁴ Davis v. Hagler, *supra*.

⁵ Pierce v. Irish, 31 Me. 254, 260. To similar effect: Smith v. McKee, 67 Iowa, 161. In this case the settlement was made by the surety of a guardian (her husband) who died after she had given notice that she would make final settlement, but before that time had arrived; the ward in said settlement accepted a note that had been taken by the guardian, and which was then good, for money of the ward loaned. The

surety (and husband) made no statement as to the solvency of the makers, but his attorney said, in presence of both parties, that he believed one of the makers to be good. The note turned out to be worthless, and the ward brought suit for its amount. It was held that as no fraud had been practised, and as the defendant held no fiduciary relation to the plaintiff, he was not liable. See also the instructive case of Fielder v. Harbison, 93 Ky. 482.

⁶ Robert v. Morrin, 27 Mich. 306.

⁷ As to which see *ante*, § 94.

⁸ Briers v. Hackney, 6 Ga. 419. It is held in this case that the omission to make settlement before the proper court avoids the plea of a settlement in bar of a bill to account. Johnson v. Johnson, 2 Hill Ch. 277, 286; Eberts v. Eberts, 55 Pa. St. 110, 117; Marr's Appeal, 78 Pa. St. 66.

does the guardian's death or the representation of insolvency of his estate deprive the court of jurisdiction to enforce such settlement, at the request of the ward, or of his administrator in case of his death. But a ward who has received the money coming to him from his guardian, though without an accounting in the Probate Court, and, several years after he attained majority, gives a receipt to the guardian, fully discharging him, will not be heard to demand a new accounting in court, when the fairness of the settlement had is not impeached; and the burden to impeach the same is on the ward.¹

Accounting with ward no defence against citation to settle required by statute.

No action of *indebitatus assumpsit* lies in favor of a former ward against his guardian before the guardian's accounts are settled;² the remedy is by proceeding in the Probate Court, or an action on the bond.³

§ 108. **Reviewing, Opening, and Setting Aside Final Settlements.**—The conclusiveness of final settlements of guardians, made by a court of competent jurisdiction, after due notice and in conformity to the requirements of the statute, not appealed from or directly assailed for fraud, has already been mentioned.⁴ Where the authority to open final settlements is conferred by statute upon either probate or chancery courts, it is limited to the time therein mentioned, or to the time provided for in the general statute of limitations,⁵ which will be considered hereafter.⁶

Limitation to open final settlements governed by statute, or statute of limitations.

But the distrust with which courts look upon transactions between guardians and wards extends to the settlements after termination of the guardianship in the proper tribunals, as well as to settlements *in pais*,⁷ and to gifts and conveyances to their former guardians by young people having recently reached majority.⁸ Hence, equity will relieve the ward against the consequences of unfair advantage

Equity will relieve against unfair advantage taken of the ward,

¹ Kittredge v. Betton, 14 N. H. 401, 405, 410.

² Thorndike v. Hinckley, 155 Mass. 263, 265; McLane v. Curran, 133 Mass. 531.

³ Brooks v. Brooks, 11 Cush. 18; Murray v. Wood, 144 Mass. 195.

⁴ Ante, § 98.

⁵ So, for instance, the action must be brought, in Indiana, within three years, or three years after removal of disability:

Briscoe v. Johnson, 73 Ind. 573, 576; Horton v. Hastings, 128 Ind. 103. So in North Carolina: Timberlake v. Green, 84 N. C. 658.

⁶ Post, § 109.

⁷ Ante, § 107.

⁸ Lord Eldon was led to commend the wisdom of a court in saying, "It is almost impossible in the course of the connection of guardian and ward, attorney and client,

taken of him in the final accounting,¹ or against an improper decree, even during the infancy of the ward.² But since the

decree or judgment in the case of a guardian's final settlement has the same conclusive force as the judgment of any court of record, the same grounds for equitable interference must be shown as in case of a judgment at law, to open such settlement.³ A fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity.⁴ The maxim

as in case of judgment at law. "de minimis non curat lex" cannot be invoked to excuse a mistake of \$10 in a guardian's account, if the amount involved is not so large as to make that item relatively unimportant.⁵ To successfully invoke the interposition of a court of equity, it is not sufficient that wrong has been done, but it must appear that the wrong occurred because of

Maxim "de minimis," &c., not applicable to item of \$10. accident, surprise, fraud, or the act of the opposite party, and without fault or neglect on part of the party complaining. The concurrence of injustice committed, and freedom from fault and negligence is an indispensable condition to the exercise of this jurisdiction.⁶ And where a guardian deals with his ward, the

In consequence of accident, surprise, or fraud, and without neglect or fraud of the party complaining. rule which obtains as to transactions between persons standing in a fiduciary relation is applicable, and courts will presume in favor of the ward and against the guardian as strongly as the facts will warrant,⁷ but when the wrong complained of is not a transaction with the ward, and was not adjudicated by the final settlement, there is no room for the application of this principle.⁸

Courts presume strongly in favor of wards and against guardians. rule which obtains as to transactions between persons standing in a fiduciary relation is applicable, and courts will presume in favor of the ward and against the guardian as strongly as the facts will warrant,⁷ but when the wrong complained of is not a transaction with the ward, and was not adjudicated by the final settlement, there is no room for the application of this principle.⁸

trustee and *cestui que trust* that a transaction shall stand, purporting to be bounty for the execution of antecedent duty:" *Hatch v. Hatch*, 9 Ves. 292, 296.

¹ *Carter v. Tice*, 120 Ill. 277, 285; *Favorite v. Slauter*, 79 Ind. 562; *Wainwright v. Smith*, 106 Ind. 239, 241; *Doan v. Dow*, 35 N. E. 709.

² *Story Eq. Pl. § 427*; *Sledge v. Boon*, 57 Miss. 222; *Loyd v. Malone*, 23 Ill. 43; *McCown v. Moores*, 12 Lea, 635; *Kuchenbeiser v. Beckert*, 41 Ill. 172, 177, cited in *Coffin v. Argo*, 134 Ill. 276, 277.

³ *State v. Roland*, 23 Mo. 95; *Mitchell*

v. Williams, 27 Mo. 399; *Garton v. Botta*, 73 Mo. 274, 276; *Stein v. Burden*, 30 Ala. 270, 273; *Allman v. Owen*, 31 Ala. 167; *Dunsford v. Brown*, 19 S. C. 560, 567.

⁴ *Lataillade v. Orena*, 91 Cal. 565, 576; *Griffith v. Godey*, 113 U. S. 89, 93.

⁵ *Ruble v. Helm*, 57 Ark. 304, 306.

⁶ *Waldrom v. Waldrom*, 76 Ala. 285, 289; *Bowden v. Perdue*, 59 Ala. 409, 412; *Hardin v. Taylor*, 78 Ky. 593, 597.

⁷ *Jennings v. Kee*, 5 Ind. 257, and see authorities under § 107.

⁸ *Wainwright v. Smith*, 106 Ind. 239, 242.

A bill or petition of review should specifically set out the errors or fraud complained of; if relief is sought on the ground of error appearing of record in a former case, or of newly discovered evidence, it is the office of the bill to surcharge and falsify; if on the ground that the settlement or decree has been obtained by fraud, the whole account may be opened, if the fraud be proved, for further hearing.¹ Mere general averment of ignorance, or averment of ignorance coupled with an admission of facts sufficient to put him on inquiry, does not entitle a party to relief on account of matters which were cognizable in the Probate Court.²

Petition for review should state facts complained of, or the fraud committed.

Under a bill in chancery to revise and correct errors in a probate decree on the final settlement of a guardian's account, the corrections ought to be confined to the errors specifically pointed out, and actual transactions, made in good faith, and not shown to work positive injustice, ought not to be set aside capriciously, because the opinions of witnesses may raise doubts as to their propriety.³ But where an action to set aside a decree discharging a guardian on final settlement is necessary, and where the Surrogate's Court is inadequate to grant relief against a fraudulent transaction complained of, the Chancery Court having obtained jurisdiction for the purpose of setting aside the final settlement will retain the whole case and determine the amount due to plaintiff upon an honest accounting.⁴

§ 109. **Limitation of Actions against Guardians at Law and in Equity.** — After a ward comes of age, the fiduciary relation of the guardian ceases; they then stand as debtor and creditor, and the claim of the ward is within the statute of limitations.⁵ This is undoubtedly the case at law,⁶ for at law no action other than that on his bond lies against a guardian, *qua* guardian, except an action of account, against which the statute clearly runs.⁷

As a general rule, limitation does not begin to run in favor of a guardian until the fiduciary relation has ceased.

¹ Yeager's Appeal, 34 Pa. St. 173, 176; Marr's Appeal, 78 Pa. St. 66, 69.

² Stoudenmire v. De Bardeben, 72 Ala. 300, 302.

³ Mounin v. Beroujon, 51 Ala. 196.

⁴ Douglass v. Ferris, 138 N. Y. 192, 201.

⁵ State v. Willi, 46 Mo. 236; Angel on Limit. § 178 (6th ed.) citing numerous decisions in support of the proposition. In Alston v. Alston, 34 Ala. 15, 29, it is

decided that the statute of limitations can not commence to run against the ward until termination of the guardianship.

⁶ Bull v. Towson, 4 Watts & S. 557, 569; Lambert v. Billheimer, 125 Ind. 519; Jones v. Jones, 91 Ind. 378, 380.

⁷ Green v. Johnson, 3 Gill & J. 389, 394. To same effect: Stumph v. Pfeiffer, 58 Ind. 472. See Linton v. Walker, 8 Fla. 144, 152 *et seq.*; Culp v. Lee, 109 N. C. 675.

The same is true of a demand by the guardian against the ward for reimbursement; in such case limitation runs from the termination of guardianship, because his cause of action does not accrue before; and the ward's removal to another State does not affect the principle.¹ But where a party assumes to act as guardian for another without legal authority to do so, and receives moneys to be appropriated for the benefit of the latter, the statute of limitations begins to run immediately, unless prevented by a disability.² Such cases raise an implied trust, in which the beneficiaries may recover in an action at law; distinguishable from technical or continuing trusts falling within the exclusive jurisdiction of courts of equity, and the doctrine, applicable to the latter, that limitation does not run against the *cestui que trust*, does not apply to the former.³ The rule is clearly stated by Chancellor Kent,⁴ as above, and he adds,⁵ after reviewing the English cases, "This case very clearly shows, that where there is a legal and an equitable remedy, in respect to the same subject-matter, the latter is under the control of the same statutory bar with the former." So where the action on the guardian's bond is barred in ten years after the ward's majority, both against the principal and his sureties, a fraudulent agreement with the ward while under age, by which he accepted less than he was entitled to in discharge of his guardian does not take the case out of the operation of the statute, because the agreement was voidable by the ward at his election, as soon as he was of age, whether fraudulent or not.⁶ So where there is a demand by the ward, and a refusal to pay the amount due the ward, the action is, in North Carolina, barred, both as to the principal and the sureties, in three years, and so an action on the bond, as against the sureties, for a breach thereof; but for a balance admitted to be due on final settlement, the action is barred as against the sureties in six years.⁷

But even in equity courts, twenty years is held to be a positive

¹ Taylor v. Kilgore, 33 Ala. 214, 221; Davis v. Ford, 7 Ohio Pt. 2, pp. 104, 109.

² Because, says Richardson, J., rendering the opinion, "the action is not distinguishable from the ordinary one of money received for another:" Johnson v. Smith, 27 Mo. 591, 593; to similar effect: Potter v. Douglass, 83 Iowa, 190.

³ Shortridge v. Harding, 34 Mo. App. 354, 359, and earlier Missouri cases cited.

⁴ In Kane v. Bloodgood, 7 Johns. Ch. 90, 110.

⁵ Ib. p. 118.

⁶ Magruder v. Goodwyn, 2 Pat. & H. 561, 573.

⁷ Kennedy v. Cromwell, 108 N. C. 1.

bar.¹ A citation to a guardian to account on the charge of gross negligence in the management of the ward's estate was held to be barred eighteen,² and in another case thirteen,³ years, after the ward's majority. A court of equity will not readily lend its aid to establish a stale claim made many years after the transaction out of which it arises, without the clearest proof of its justness.⁴ All reasonable intendments should in such case be made in support of the action of the court.⁵

Acquiescence for unreasonable length of time in the judgment of a court of competent jurisdiction by the ward, after he was of age and had knowledge of the matter, is such laches as will preclude the ward from obtaining a re-trial of the questions presented at the final settlement in the Probate Court, without averment and proof of fraud or accident, unmixed with negligence or fault on the ward's part. Thus acquiescence for two years is held sufficient to bar the ward.⁶ And equity will refuse relief where it appears that the ward had given a receipt in full, many years before the filing of the bill, and where it does not appear but that the ward is capable of being correctly informed as to the facts and circumstances and his own rights, and no improper influence is shown, and no deceit.⁷

§ 110. **Enforcement of the Judgment or Finding of the Court on Final Accounting.** — The judgment of a court in an action of account, or on the guardian's bond, and the decree on an accounting in equity will be enforced in the usual course of procedure of the courts in which the actions are brought. But under the doctrine applicable, in most States, to probate courts, that they possess no power or jurisdiction not expressly, or by necessary implication, conferred by statute, they have not the power, in the absence of statutory authorization, to carry into effect their judgments, decrees, or findings on guar-

20 years a positive bar;

so 18 years;

13 years.

Acquiescence in judgment after ward's majority is laches.

Judgments enforced by ordinary process of law.

¹ Bull v. Towson, 4 Watts & S. 557, 569. In Alabama a delay of nearly ten years was held fatal, where the guardian had died before the filing of the bill: Jackson v. Harris, 66 Ala. 565.

² Bones' Appeal, 27 Pa. St. 492.

³ Lane v. Lane, 87 Ga. 268, 270.

⁴ Railsback v. Williamson, 88 Ill. 494.

⁵ Morganstern v. Shuster, 66 Md. 250.

⁶ High v. Snedcor, 57 Ala. 403, 409; four years: Steadham v. Sims, 68 Ga. 741; eight years: Bauer's Estate, 12 Pa. Co. Ct. R. 77.

⁷ Southall v. Clark, 8 St. & Porter, 338; Morganstern v. Shuster, 66 Md. 250.

But in probate courts only in the mode directed by statute.

dian's final accounting, though they may possess exclusive original jurisdiction to entertain or compel such accounting. Hence, without such statutory

power, probate courts cannot order a ward to pay to his guardian a balance found due from him to the guardian on final accounting; and such a settlement cannot have the effect of a judgment against the ward, nor would it be evidence of indebtedness for the purpose of an action against the ward, unless there

On payment of ward's liabilities, guardian is entitled to the securities.

had been an express or implied promise by the ward.¹

But where a guardian advances money in protection of his ward's property, the guardian is entitled to the assignment of the securities, and in equity they are treated as having been so assigned.²

In States where the court exercising probate jurisdiction is clothed with power to compel obedience to its orders and decrees, and where such court has exclusive jurisdiction between guardian and ward,³ it is held that this involves the power, in such courts, to enforce

Probate Court may compel payment of balance found due the guardian.

payment by a ward of a balance found due the guardian on final settlement,⁴ or by the guardian to the ward.⁵

In many States, probate courts, or courts exercising probate jurisdiction, are authorized by statute to enforce the payment

Statutory power to compel payment by the guardian to the ward.

of money or delivery of specific property to their late wards, found on final accounting to be due them, by attachment or execution.⁶ In others, the finding of the court is conclusive on the parties; and while the

Probate Court may not have power to compel obedience to its

Finding of Probate Court may be enforced by action.

judgment or decree, or to enforce the rendition of the balance found, yet such finding, judgment, or decree constitutes a liability of the guardian which may be

enforced by action against him and his sureties, or otherwise.⁷

¹ *Wyatt v. Woods*, 31 Mo. 351, 353; *Frost v. Winston*, 32 Mo. 489; *Duval v. Chaudron*, 10 Ala. 391; *Matter of Richards*, 6 Serg. & R. 462; *Brown v. Chadwick*, 79 Mo. 587; *Davis v. Ford*, Wright, 200; *McCormick v. Joyce*, 7 Pa. St. 248.

² *Kelchner v. Forney*, 29 Pa. St. 47, 49. To similar effect: *Higgins v. McClure*, 7 Bush, 379.

³ *Carl v. Wonder*, 5 Watts, 97.

⁴ *Shollenberger's Appeal*, 21 Pa. St. 337, 342, citing *Hooper v. Eyles*, 2 Vern. Ch. 480, and *Raynesford v. Freeman*, 1 Cox's Ch. 417.

⁵ *Yeoman v. Younger*, 83 Mo. 424, 429.

⁶ Code, Ala. 1887, § 2464; *Treadwell v. Burden*, 8 Ala. 660, 663; *Smith v. Jackson*, 56 Ala. 25; *Sand & Hill's Dig. & St. Ark.* 1894, § 3638; *State v. Slevin*, 93 Mo. 253, 259.

⁷ *Pickens v. Bivens*, 4 Heisk. 229;

Where by statute authority is conferred upon a court to appoint and remove guardians, and to direct and control their conduct and to settle their accounts, it is held to be the intention of the legislature to invest such court with all the jurisdiction necessary to give force and efficiency to its decisions, and to enforce them by process of attachment, notwithstanding that such courts can exercise only such jurisdiction as has been expressly conferred upon them, and notwithstanding the absence of express authority to issue the process of attachment.¹ "Upon removal of the guardian," says Chancellor Walworth,² "it was a matter of course to require him to account, and to pay over to his successor the balance, if any, which should be found in his hands upon such accounting."

Authority of courts to give effect to their decisions.

It seems self-evident that an order made by a probate court upon a guardian to pay the ward an amount found due on a previous final settlement, may be defended by the guardian, by showing that he had paid his ward in full or in part, since such settlement was confirmed.³

But in other States it is held that the power to entertain final settlements, and to take all necessary measures to bring delinquent guardians to a settlement of their accounts does not include power to render judgment and award execution, even with the aid of a statute vesting the court with all incidental powers belonging to the court with which its jurisdiction is concurrent, for the purpose of exercising and effectuating such jurisdiction.⁴

Power to compel final settlement does not include power to award execution.

The assignment by an insolvent guardian who has not settled his account on the ward's majority of a mortgage of real estate to secure payment of a less sum than the amount due his ward, executed in the presence of witnesses, with the view of setting it apart as the property of

Assigned mortgage may be claimed by ward.

Ralston v. Wood, 15 Ill. 159; *Gillet v. Wiley*, 126 Ill. 310; *Lindsay v. Lindsay*, 28 Oh. St. 157; *Favorite v. Booher*, 17 Oh. St. 548; *Crowell v. Ward*, 16 Kans. 60, holding that such action may be brought in the name of the ward, though the bond was executed to the State as obligee; *Cobb v. Kempton*, 154 Mass. 266, holding that the decree of the Probate Court, and the refusal of the guardian's representative to comply with it, creates a

debt for which the ward may sue in his own name.

¹ *Seaman v. Duryea*, 11 N. Y. 324; *Kelchner v. Forney*, *supra*; *Yeoman v. Younger*, 83 Mo. 424, 429.

² In *Skidmore v. Davies*, 10 Paige, 316, 317.

³ *George v. Patterson*, 55 Ark. 588, 592.

⁴ *Pickens v. Bivens*, 4 Heisk. 229.

the ward, and retained by him until after the institution of proceedings in insolvency by him, more than a year afterward, and then taken by the assignee in insolvency, may be claimed by the ward by bill in equity, although he was ignorant of its existence until after the commencement of proceedings in insolvency.¹

For the amount found to be due to the ward on final settlement, the judgment against the curator constitutes a lien against his

Amount due
by guardian
on final settle-
ment is a lien
against his
real estate.

real estate.² In Louisiana the recording of a certificate by the clerk of the court of the amount of a minor's property, according to the inventory on file in his office, operates as a legal mortgage in favor of the minor, for the amount therein stated, on all the immovable property of the tutor, from the day of his appointment until the liquidation and settlement of his final account; covering not only the particular property inventoried, but the eventual balance that may be found to be due by the tutor at the close of his tutorship; and there is no law authorizing the absolute release of the tutor's personal responsibility or of the tutor's property from the legal mortgage securing that responsibility until the termination of his functions.³

§ 111. Order discharging Guardian. — The word "discharge," as used in connection with guardians, may be held to mean simply

"Discharge"
may mean ces-
sation of au-
thority.

the cessation of the guardian's authority when the ward dies, or attains majority, or ceases to be incompetent, or when the guardian resigns or is removed, and is generally so used in connection with the running of the statute of limitations.⁴ But the natural meaning, and that in which it is most generally used, is that the guardian or the sure-

But the usual
meaning is re-
lease from
liability,

ties, to whom it is applied, have fully complied with their duty under the law, and stand released from any liability to the ward, except on appeal, or in equity for fraud or mistake. Statutes, for instance, providing that guardians shall not be discharged by order of the Probate Court until the expiration of one year after the ward's majority,⁵ can mean

¹ Moore v. Hazelton, 9 Allen, 102.

² State v. Todd, 57 Mo. 217.

³ Schneider v. Burns, 45 La. An. 875, 879.

⁴ Tate v. Stevenson, 55 Mich. 320 (referring to Lyster's Appeal, 54 Mich. 325); Loring v. Alline, 9 Cush. 68, 70; McKim

v. Mann, 141 Mass. 507, 508; Hudson v. Bishop, 32 Fed. Rep. 519, 521; Paine v. Jones, 67 N. W. Rep. (Wis.) 31.

⁵ As in North Dakota: Rev. C. 1895, § 2829; Montana: Comp. St. 1888, Prob. Ch. xv. § 430; Massachusetts: Publ. St. 1882, Ch. 144, § 12.

only this. The same is true of a statute providing for the guardian's discharge after notice to the ward, trial, and order to pay by the court, and acknowledgment of satisfaction by the ward;¹ a provision that the decree on final settlement shall not be conclusive until one year after the ward's majority;² allowance of appeal at any time within one year,³ or six months from the time of the settlement,⁴ and the ruling that the order of discharge cannot be entered before it is shown to the court that the guardian had complied with former orders, and paid over all money in his hands belonging to the ward.⁵

and cannot be granted until it is shown to the court that all its orders and statutory requirements have been complied with.

The ward is entitled to receive, in payment of the sum found due him, legal currency, or the specific securities belonging to him;⁶ hence, a bond or note given by a guardian in settlement of his guardianship account after majority of his ward, is no discharge of his liability, or of that of his sureties, on the guardianship bond.⁷ So the ward is not precluded from bringing an action for the money due him, by an agreement void for the want of valid consideration to extend the time of payment.⁸ Payment to a person not authorized to receive the money is not in performance of the condition of the bond, and the refusal to make such payment is not a breach of the bond;⁹ nor does the receipt of a guardian in one State by a guardian appointed afterward in another, for specific property, discharge the former from responsibility for loss by previous mismanagement.¹⁰

Guardian's bond or note to the ward is not payment.

But refusal to pay to an unauthorized person is no breach of the bond.

But where the ward (and her husband) accepts the note of her guardian (under seal) in settlement of her guardian's account, and gives him (with her husband) a receipt in full, intending thereby to release him from all liability growing out of the guardianship, and where the husband is trustee under a marriage contract settling the

And payment by note may, if accepted, constitute a novation.

¹ As in Missouri: Rev. St. 1889, §§ 5329-5332.

² *Sledge v. Boone*, 57 Miss. 222.

³ As in Arkansas: Sand. & H. Dig. 1894, § 3637.

⁴ Rev. St. Mo. 1889, § 5335. This section is construed as requiring the appeal in proceedings against the executor of a deceased guardian to compel final settlement, to be taken within the time limited for appeals in cases against executors un-

der the administration law: *Cissell v. Cissell*, 77 Mo. 371.

⁵ *Gillett v. Wiley*, 126 Ill. 310, 321.

⁶ See in connection with this subject, *ante*, §§ 103-105 inclusive.

⁷ *Hamlin v. Atkinson*, 6 Rand. 574, 579; *Bowers v. State*, 7 Harr. & J. 32; *Fridge v. State*, 3 Gill & J. 103, 117.

⁸ *Douglass v. State*, 44 Ind. 67.

⁹ *Favorite v. Booher*, 17 Oh. St. 548, 555.

¹⁰ *Lamar v. Micou*, 112 U. S. 452, 464.

property (of which the note is a part) to the wife for life, with remainder over, the transaction was held a novation of the debt of the guardian destroying its fiduciary character.¹ And so it is a complete defence to an action to recover an amount due a minor, that after he had attained majority he had settled and received payment, part cash and part note.²

§ 112. **Appeals in Proceedings affecting Minors.** — The right of appeal exists solely by virtue of statutory provision;³ hence, no appeal can be entertained or allowed unless authority for the same is found in the statute,⁴ although the right of appeal be expressly recognized by the constitution of the State.⁵

Appeal, if authorized by the statute, may be taken by any person, whether a party to the record or not, who is directly affected and concluded by the order, judgment, or decree appealed from.⁶ But the appellant, if not a party to the record, must show that he is interested in the matter litigated either as creditor, heir presumptive, or in some such way that the order or judgment complained of operates directly upon his property or interest.⁷ A grievance to the feelings of propriety or sense of justice is not such a grievance as will give a right to appeal;⁸ hence, a relative has no right, merely as such, to appeal from the decision of the Probate Court aggrieving him, though it be a father⁹ or stepmother.¹⁰

The appeal lies, of course, from such decisions only, as but for the appeal would constitute binding, conclusive, and final determinations of the rights of the parties affected thereby, taking effect, or capable of being enforced, without further order.¹¹ No appeal lies from an order refusing to set aside an order that is itself appealable;¹² nor will an appealable order be reviewed on appeal from a subsequent order.¹³

¹ *Coleman v. Davies*, 45 Ga. 489.

² *Cheever v. Congdon*, 34 Mich. 296.

³ See, as to appeals from judgments or decrees of probate courts, *Woerner on American Administration*, § 543 *et seq.*, where the subject is fully considered; *Messenger v. Teagan*, 64 N.W. (Mich.) 499.

⁴ *Moore, in re*, 86 Cal. 58; *Estate of Roddick*, 1 Ariz. 411; *Deer Lodge v. King*, 2 Mont. 66, 71.

⁵ *Hilliard on New Trials*, ch. 21, § 3 *et seq.*; *Ohio & Mississippi R. R. Co. v. Lawrence*, 27 Ill. 50, 52.

⁶ *Morris v. Garrison*, 27 Pa. St. 226, 227; *Hill's Heirs*, 7 Wash. 421; *Witham, Appellant*, 85 Me. 360; *Lawless v. Reagan*, 128 Mass. 592; *Taff v. Hosmer*, 14 Mich. 249, 259.

⁷ *Deering v. Adams*, 34 Me. 41, 44.

⁸ *Norton's Appeal*, 46 Conn. 527.

⁹ *Cook v. Cook*, 57 N. W. (Iowa) 1085.

¹⁰ *Lawless v. Reagan*, 128 Mass. 592.

¹¹ *Woerner on Adm.* § 545; *Nally v. Long*, 56 Md. 567, 570.

¹² *Young, in re*, 90 Cal. 77.

¹³ *Estate of Burns*, 54 Cal. 223, 228.

An order, though erroneous, will not be reversed on appeal, if no one has been injured thereby.¹

Appeal is denied also from decisions by the probate judge in the exercise of a discretion intrusted to him.² So the selection of a guardian to a minor is held, in some States, to be purely discretionary, no appeal lying from its exercise,³ while in others the appellate courts will interfere with the discretion only in cases of gross abuse,⁴ yet hold such appointments reviewable on appeal.⁵

No appeal is allowed from exercise of pure discretion,

except for gross abuse.

In most States appeals are allowed from probate courts, not directly to the court of last resort, but to an intermediate court, in which the matter in controversy is tried *de novo*, and which proceeds in the trial as if the case had originated there, pronouncing judgment and determining the facts and their legal effect,⁶ not confining itself to the questions raised or decided by the Probate Court,⁷ but exercising a jurisdiction co-extensive with that of the Probate Court, including matters of discretion of the latter, if appealable,⁸ and with power to make any order which the Probate Court itself could make.⁹

Appeals not directly to court of last resort, but tried *de novo* in appellate court.

But in those States, in which authority over guardians and in testamentary matters is vested in the courts of ordinary jurisdiction for the trial of cases at law and in equity, appeal lies, of necessity, to the court of last resort immediately, in the same manner and under like conditions as appeals are allowed from judgments and decrees of such courts in other cases.¹⁰ And some statutes authorize appeal directly to the court of last resort from special probate courts, — for instance, in Maine,¹¹ Maryland,¹² Massachusetts,¹³ New Hamp-

Statutes may give appeal directly to court of last resort.

¹ Estate of Miner, 46 Cal. 564, 568.

² King v. Rockhill, 41 N. J. Eq. 273.

³ Cramer v. Forbis, 31 Ill. App. 259; Adams v. Specht, 40 Kans. 387, 390; State v. Houston, 32 La. An. 1305; Compton v. Compton, 2 Gill, 241, 253.

⁴ Matter of Johnson, 87 Iowa, 130, 135; Sadler v. Rose, 18 Ark. 600, 602; Nelson v. Green, 22 Ark. 367; Battle v. Vick, 4 Dev. L. 294; Long v. Rhymes, 2 Murphy, 122.

⁵ Lawrence v. Thomas, 84 Iowa, 362; Senseman's Appeal, 21 Pa. St. 331, 334; Adams' Appeal, 38 Conn. 304, 307.

⁶ Adams v. Adams, 21 Vt. 162, 164.

⁷ Maughan v. Burns, 64 Vt. 316; Engle v. Yorks, 64 N. W. (S. Dak.) 132.

⁸ Maughan v. Burns, *supra*; Francis v. Lathrope, 2 Tyler, 372; Holmes v. Holmes, 26 Vt. 536, 540; Watson v. Warnock, 31 Ga. 716, 718.

⁹ Broadwater v. Richards, 4 Mont. 52.

¹⁰ Woerner on Adm. § 549.

¹¹ Rev. St. 1883, ch. 63, § 23.

¹² Code, 1888, Art. 5, § 58.

¹³ Publ. St. 1882, ch. 156, § 5.

shire,¹ and Rhode Island. In Alabama appeal may be taken to either the Circuit or Supreme Court;² in Oklahoma appeals involving questions of law only are allowed directly to the Supreme Court, while such as involve questions of fact must go to the District Court, a different course of procedure being prescribed for either class of cases;³ in Tennessee, in cases in which the County Court and Chancery Court have concurrent jurisdiction, appeal lies from either court to the Supreme Court directly;⁴ and in Texas appeal lies from the District Court to the Supreme Court in all cases, whether originally brought in that court, or appealed from the Probate Court; but appeal from Probate Court lies only to the District Court.⁵ In Iowa, the appointment of a guardian to a minor is held to be within that class of cases which the statute requires to be prosecuted like actions in ordinary cases, and therefore not triable *de novo* on appeal, but only on assignment of errors.⁶

¹ Publ. St. 1891, ch. 200, § 1.

² Code, 1886, §§ 3611, 3640, 3641.

³ *Bricknell v. Sporleder*, 3 Okl. 561, 566.

⁴ Code, 1884, § 3865. But where the Probate Court has exclusive original juris-

diction, appeal lies to the intermediate court.

⁵ Sayles' St. 1888, §§ 1790; 1380; 1118; 1789.

⁶ *Lawrence v. Thomas*, 84 Iowa, 362, 363.

PART SECOND.

OF THE GUARDIANSHIP OVER PERSONS OF UNSOUND
MIND.

TITLE FIFTH.

OF THE PROCEDURE TO ESTABLISH UNSOUNDNESS OF
MIND.

CHAPTER XIV.

OF THE JURISDICTION OVER PERSONS OF UNSOUND MIND.

§ 113. **Classes of Persons of Unsound Mind.**—For the purposes of the present treatise it is neither necessary nor profitable to attempt an accurate definition, from either the legal or medical standpoint, of the terms idiocy, insanity, lunacy, or *non compos mentis*, or to dwell at any length upon the learned disquisitions thereon contained in numerous as well as voluminous text-books, and opinions by eminent physicians, lawyers, and judges. It is sufficient to know to what class of persons the various statutes refer by the use of these or similar terms, because the extent and manner of the protection afforded by the States to those who, from mental incapacity, are unable to help themselves, is matter of statutory regulation in all of them.

No practical distinction made in this treatise between different classes of unsoundness of mind.

In England a distinction was originally taken between idiots and lunatics. “An idiot,” says Blackstone,¹ “or natural fool, is one that hath had no understanding from his nativity; and there-

¹ 1 Bla. *302.

Original distinction between idiots and lunatics involves that

profits of idiots' lands go to the king;

but the crown is trustee for lunatics and accounts to them.

Original distinction of little importance in America.

Courts do not confine their protection to idiots, lunatics, or insane persons,

fore is by law presumed never likely to attain any.' In such case the common law writ *de idiota inquirendo* issued, "to inquire whether he be an idiot or not, which must be tried by a jury of twelve men, and if they find him *purus idiota*, the profits of his lands, and the custody of his person may be granted by the king to some subject, who has interest enough to obtain them."¹

But a "lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason." "To these also,"² continues Blackstone, "as well as idiots, the king is guardian, but to a very different purpose.

For the law always imagines that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives."³

The distinction between idiocy and lunacy, or, as more generally styled, insanity, is still preserved, in name at least, in most of the States. But the distinction, for any purpose connected with

the guardianship over either or any class of insane persons, has no practical significance in America.

The object of this guardianship being to protect the property of a mentally incompetent person and to apply it primarily for his and his family's benefit and enjoyment, and incidentally to preserve it for his heirs and distributees, or legatees as the

case may be, it is evident that the commission of lunacy, or proceedings in the nature of the writ *de lunatico inquirendo*, is not confined to the cases of persons who may be strictly classed as idiots, luna-

¹ 1 Bla. 303.

² 1 Bla. 304, having referred to the ancient notion that lunatics have lucid intervals, "sometimes enjoying their senses, and sometimes not, that frequently depending on the moon;" and stating that "under the general name of *non compos mentis* (which Sir Edward Coke says is the most legal name) are comprised not only lunatics, but persons under frenzies, or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so, or such, in short, as are judged by the Court of Chancery incapable to manage their own affairs."

³ 1 Bla. 304. The statute of 17 Edw. II. c. 10, providing for the custody and sustentation of lunatics, and the preservation of their lands and profits thereof for their use by the king, and that the king shall take nothing to his own use; and that the residue on the death of the parties shall be distributed for their souls by the advice of the ordinary (by later enactments shall go to their executors or administrators) was not introductory of a new right, but only went to regulate a right pre-existing in the crown: Per Kent, Ch., in *Matter of Barker*, 2 Johns. Ch. 232, 237. And see 1 Hammond's Blackstone, 554, note (*).

tics, or insane persons in the technical sense;¹ "It is sufficient that he be mentally incompetent to govern himself or to manage his own affairs, from whatever cause this incapacity may arise. Hence, permanent mental weakness amounting to such incapacity, arising from advanced age, sickness, habitual drunkenness, or imbecility constitutes in law '*Unsoundness of Mind*,' and as such becomes tantamount in its effects to those produced by idiocy or lunacy, for such conditions all equally express mental incapacity for the government of one's affairs. Such a person is in legal intendment *non compos mentis*." ²

but extend it to all who are mentally incapable to protect themselves.

As in England, so in the United States, the technical distinctions between idiocy, lunacy, insanity, or the "four manners of *non compos mentis*" mentioned by Coke,³ and the consequent refusal of the court to grant a commission of lunacy in cases where the party was not in a technical sense an idiot or lunatic,⁴ are now disregarded,⁵ and the test of the power of a chancery or probate court is held to be whether the person under examination is, or is not, mentally incapable of governing himself and managing his property.⁶ The function of the guardian,

¹ Ridgeway v. Darwin, 8 Ves. 65.

² Ordronaux, Lun. L. XXI. p. xxxvii. and authorities cited. See, as to the various classes of persons subject to be put under guardianship, under American statutes, *post*, § 114.

³ Beverley's Case of *Non Compos Mentis*, Coke, pt. 4, p. 124.

⁴ *Ex parte Barnsley*, 3 Atk. 168; Lord Donegal's Case, 2 Ves. Sen. 407; Beaumont's Case, 1 Whart. 52 (in this case the court call attention, that the Court of Chancery in England had of late gone beyond the limits set by Lord Hardwicke, and had applied commissions — not *de lunatico inquirendo*, but in the nature of those of lunacy, to cases where there is such an imbecility of mind as renders a person incompetent to manage his affairs, or liable to be imposed on. . . . "In short," says Kennedy, speaking for the court, "the distinction between those who are styled *non compotes mentis* in law, and those who labor under extreme imbecility of mind, is very clearly maintained through every part of it: and in order to prevent confusion it may be important, perhaps, that

this distinction should continue to be observed. And until the legislature shall authorize the courts of this State to entertain a proceeding with a view to deprive the latter description of persons of all control and power over their estates, they cannot take cognizance of it."); *Jenkins v. Jenkins*, 2 Dana, 102.

⁵ "Of late, the question has not been whether the party is absolutely insane; but the court has thought itself authorized (though certainly many difficult and delicate cases with regard to the liberty of the subject occur upon that) to issue the commission, provided it is made out that the party is unable to act with any proper and provident management; under that imbecility of mind, not strictly insanity, but as to the mischief calling for as much protection as actual insanity:" *Ridgeway v. Darwin*, 8 Ves. 65. To similar effect: *Commonwealth v. Schneider*, 59 Pa. St. 328; *Nailor v. Nailor*, 4 Dana, 339, 343; *Greenwade v. Greenwade*, 43 Md. 313, 315.

⁶ *Lackey v. Lackey*, 8 B. Mon. 107; *In re Conover*, 28 N. J. Eq. 330; *Dennett*

The functions of guardians are the same, from whatever cause mental incapacity exists.

committee, conservator, or whatever may be the name of the trustee appointed to have the care and custody of the person and management of the estate of a person of unsound mind, is the same, no matter from what cause his inability to take care of himself or his estate may have arisen, so that it be owing to a defect of the mind. Nor does it matter, if the necessity to appoint a guardian appears, whether the disease be curable or incurable; for provisions exist in all of the States for a cessation of the guardianship whenever it becomes unnecessary.

But the mental incapacity must be such as to deprive the party of the power to manage his affairs;

it is not enough that others might manage it to better advantage.

It is to be observed, however, that the unsoundness of mind which will justify the appointment of a guardian must be more than mere debility or impairment of memory; it must be such as to deprive the person affected of ability to manage his estate.¹ If the defendant is capable of transacting the ordinary business involved in taking care of his property, and if he understands the nature of his business and the effect of what he does, and can exercise his will with reference to such business with discretion, notwithstanding the influence of others, he is not of unsound mind within the meaning of the statute, and should not be deprived of the control of his property.²

§ 114. **Statutes Defining and Classing Unsoundness of Mind.** — In Alabama³ the term “of unsound mind” is defined by statute to include idiots, lunatics, and insane, and in Indiana⁴ furthermore *non compos*, monomaniacs, and distracted persons. So the term “lunatic” is enacted to include idiots, insane and distracted persons, and every person who, by reason of intemperance or any disorder or unsoundness of mind, shall be incapable of managing and caring for his estate in Colorado;⁵

v. Dennett, 44 N. H. 531, 537; *Robertson v. Lyon*, 24 S. C. 266, 272; *Snyder v. Snyder*, 142 Ill. 60, 66.

¹ *Matter of Collins*, 18 N. J. Eq. 253; *Matter of Lindsley*, 43 N. J. Eq. 9; *Henderson v. McGregor*, 30 Wis. 78, 80; *Commonwealth v. Reeves*, 140 Pa. St. 258.

² *Emerick v. Emerick*, 83 Iowa, 411, 414.

³ Code, 1886, § 2410.

⁴ Ann. Rev. 1894, § 2714. The statute

is held to extend “to every case of mental unsoundness or imbecility which has reached such a degree as renders the subject incapable of conducting the ordinary affairs of life, and leaves him in a condition to become the victim of his own folly, or the fraud of others:” Per *Mitchell, J.*, in *McCammon v. Cunningham*, 108 Ind. 545, 547.

⁵ Mills’ Ann. St. 1891, § 2968.

but in Virginia¹ and West Virginia² idiots are excluded from this definition; and so in New York.³ "lunatics," "idiots," "Insane person" is made to include idiots, *non compos*, lunatic and distracted persons in Colorado,⁴ "insane persons."⁵ Iowa,⁶ Maine,⁶ Massachusetts,⁷ Michigan,⁸ New Hampshire,⁹ Vermont,¹⁰ Virginia,¹¹ and West Virginia,¹² and "insane" and "lunatic" include every species of mental derangement in Ohio;¹³ "person of unsound mind" and "insane person" is to be construed to mean either an idiot, or a lunatic, or a person of unsound mind incapable of managing his own affairs, in Missouri.¹⁴ But in Minnesota¹⁵ idiots and imbeciles are excepted.

The term "spendthrift" is applied to persons who by excessive drinking, gaming, idleness, debauchery, or vicious habits of any kind, have become unable to take care of themselves and their estates; or who so spend, waste, or lessen their estate as "Spendthrifts." to expose themselves or their families to want or suffering; or any town, village, city, or county to expense for the support of himself or his family, and are therefore liable to be placed under guardianship; so, for instance, in Illinois,¹⁶ Maine,¹⁷ Massachusetts,¹⁸ Michigan,¹⁹ Minnesota,²⁰ Nebraska,²¹ New Hampshire,²² Oregon,²³ Rhode Island,²⁴ and Vermont.²⁵ In Louisiana, where not only lunatics and idiots are liable to interdiction,²⁶ but all persons who, owing to any infirmity, are incapable of taking care of themselves and their estates, interdiction is not allowed on account of profligacy or prodigality.²⁷

Habitual drunkards are, as appears from the above-mentioned provisions regarding spendthrifts, classed with these, "Habitual drunkards." and as being in need of guardians as much as persons

¹ Code, 1887, § 1712.

² Code, 1891 (3d ed.), ch. 58, § 44.

³ Bliss' Code, 1890, § 3343, pl. 15.

⁴ Mills' Ann. St. 1891, § 4185 ("lunatic" defined in statute of Colorado, *supra*).

⁵ McClain's Ann. Code, 1888, § 2237; see *Speedling v. Worth Co.*, 68 Iowa, 152.

⁶ Rev. St. 1884, ch. I. § 6, pl. 8.

⁷ Publ. St. 1882, ch. 3, § 3, pl. 10.

⁸ Howell's St. 1882, § 2, pl. 7.

⁹ Publ. St. 1891, ch. 2, § 18.

¹⁰ Rev. St. 1894, § 7.

¹¹ Code, 1887, § 5, pl. 5.

¹² Code, 1891 (3d ed.), ch. 13, § 17, pl. 14.

¹³ St. 1890, § 1536.

¹⁴ Rev. St. 1889, § 5562.

¹⁵ St. 1891, § 5886.

¹⁶ Rev. St. 1896, ch. 86, § 1.

¹⁷ Rev. St. 1883, ch. 67, § 4.

¹⁸ Publ. St. 1882, ch. 139, § 8.

¹⁹ Howell's St. 1882, § 6317.

²⁰ St. 1891, § 5754.

²¹ Comp. St. 1891, ch. 34, § 17.

²² Publ. St. 1891, ch. 179, § 3.

²³ Code and Gen. L. 1887, § 2891.

²⁴ Publ. St. 1882, ch. 168, §§ 7, 8.

²⁵ Rev. St. 1891, § 2750.

²⁶ Voorh. C. C. 1889, Art. 422.

²⁷ *Ib.* Art. 426.

of unsound mind from other causes. They are, however, proceeded against *eo nomine* in Alabama,¹ Georgia,² Illinois,³ Indiana,⁴ Iowa,⁵ Kansas,⁶ Mississippi,⁷ Missouri,⁸ New York,⁹ North Carolina,¹⁰ Ohio,¹¹ Pennsylvania,¹² Rhode Island,¹³ Texas,¹⁴ Wisconsin,¹⁵ and Wyoming.¹⁶ In Mississippi drunkards are classed with opium and morphine eaters, to whom courts of chancery may appoint guardians;¹⁷ and in Arkansas,¹⁸ North Carolina,¹⁹ Ohio,²⁰ and Wyoming,²¹ they are placed in the same category with idiots, lunatics, and insane persons. In the State of Washington it is held that the appointment of a guardian for the person and estate of one whose mind has become unsound from the constant and excessive use of alcoholic liquors, thereby rendering him incapable of conducting his own affairs is authorized under a statute providing that guardians may be appointed to take the care, custody, and management of all idiots, insane persons, and all who are incapable of conducting their own affairs," &c.²²

Deaf and dumb persons, when incapable of managing their estates,²³ or who cannot make known their thoughts or desires, and are incompetent to manage their estates;²⁴ persons imbecile or incompetent to manage their estates on account of the infirmity of old age,²⁵ and persons mentally incompetent, from any cause, to manage their property,²⁶ are sev-

¹ Code, 1886, §§ 2502-2505.

² Code, 1882, §§ 331 ; 1852.

³ Rev. St. 1896, ch. 86, § 1.

⁴ Ann. Rev. 1894, § 5743. In this State the constitutional power of the legislature to pass an act authorizing the appointment of a guardian over the person and estate of an habitual drunkard having been assailed, was upheld by the court: *Devin v. Scott*, 34 Ind. 67, 69.

⁵ McClain's Ann. Code, 1888, § 3463.

⁶ Gen. St. Ann. 1889, § 3678.

⁷ Ann. Code, 1892, § 2215.

⁸ Rev. St. 1889, § 5561.

⁹ Bliss' Ann. Code, 1890, citing L. 1874, tit. 2, § 1.

¹⁰ Code, 1883, § 1670: "Inebriate, . . . incompetent to manage his own affairs by reason of excessive use of intoxicating drinks."

¹¹ Rev. St. 1890, § 6317.

¹² Bright. Purd. Dig. 1885, p. 690, § 1 ; p. 1125, § 1.

¹³ Publ. St. 1882, ch. 168, § 8.

¹⁴ Sayles' Civ. St. 1888, § 2653.

¹⁵ Ann. St. 1889, § 3978.

¹⁶ Rev. St. 1887, § 2287.

¹⁷ Ann. Code, 1892, §§ 2215, 2216.

¹⁸ Dig. 1894, § 3814.

¹⁹ But inebriety must be of at least a year's standing: Code, 1883, § 1671.

²⁰ Rev. St. 1890, § 6317.

²¹ Rev. St. 1887, § 2287.

²² Wetmore's Guardianship, 6 Wash. 271, 273, Hoyt, J., dissenting on the ground that the statute contemplates only those cases of insanity or imbecility which might be presumed to be, to a certain extent, permanent, and not at all cases of drunkenness, whether habitual or otherwise: p. 278.

²³ *Gray v. Obear*, 59 Ga. 675, 680.

²⁴ Kentucky: St. 1894, § 2149.

²⁵ *Ib.*

²⁶ Idaho: Rev. St. 1887, § 5784.

erally mentioned as persons liable to be put under guardianship. The gravamen in all instances is seen to be the inability of the individual to take proper care of himself or his property on account of some mental defect. In Maine provision is also made for the appointment of guardians to convicts committed to the state prison for a term less than for life;¹ and in Vermont a guardian is to be appointed to an absconding person leaving wife and children.²

Guardians to convicts for less than life and absconding persons.

§ 115. **Jurisdiction over Persons of unsound Mind without Inquisition.** — It has already been mentioned³ that the English jurisdiction in lunacy is generally ascribed to the king's warrant under his sign manual; and that, when the fact of lunacy has been established, the superintendence of the trust is a part of the general jurisdiction of the Court of Chancery. It was Lord Campbell's opinion that a commission *de idiota* or *de lunatico inquirendo* would issue at common law from the Court of Chancery under the Great Seal.⁴ But chancery will exercise a temporary jurisdiction even though the fact of insanity has not been ascertained by inquisition or other proceeding had, under circumstances rendering such interference necessary for the protection of the estate, or of the maintenance of a person of unsound mind,⁵ but will not appoint a guardian in such case.⁶ So in the United States: If the estate or income is too small to defray the expenses of a commission in lunacy; or if the object in view may be attained as safely and as fully in all respects without it, the execution of the inquisition may be suspended or dispensed with altogether,⁷ and the court will, in the exercise of its equitable jurisdiction, when necessary, extend its protection to the person or estate, though it may not undertake to confine or dispose of the person or estate.⁸ So an act conferring upon overseers of the poor power to take and confine the body of any insane person without trial or legal proceeding by which the fact of insanity could be judicially ascertained, was construed as applying only to

Chancery will protect persons of unsound mind, if necessary,

but will appoint no guardian without inquisition.

¹ Rev. St. 1883, ch. 67, § 4, pl. III.

² Rev. St. 1894, § 2756.

³ *Ante*, § 2.

⁴ Lord Campbell's Lives, Vol. 1, p. 14, as cited by Buswell in his Law of Insanity, § 29.

⁵ *Vane v. Vane*, L. R. 2 Ch. Div. 124.

⁶ *In re Bligh*, L. R. 12 Ch. Div. 364; *Brandon's Trust*, L. R. 13 Ch. Div. 773.

⁷ *Owing's Case*, 1 Bland Ch. 290.

⁸ *Owing's Case*, *supra*; *Matter of Kenton*, 5 Binn. 613; and see authorities *infra*, p. 383, note 2.

such insane, lunatic, or distracted persons as have an estate, and who, after service of process, had been found such by a jury; otherwise it would be in derogation of the rights of civil liberty guaranteed by the Constitution.¹ But an act providing for the imprisonment of a person convicted as "an inebriate, habitual or common drunkard," in any inebriate or insane asylum for not more than two years, nor less than three months, "provided some friend or relative shall execute a bond conditioned that he will pay for the support of such inebriate, habitual or common drunkard during his imprisonment and confinement" was, in Wisconsin, held unconstitutional.²

On the same principle, this jurisdiction may be invoked in favor of the relatives or dependents of the insane person;³ and where, for instance, administration to a next of kin was granted *durante animi vitio*.⁴

The general doctrine, that no man can be deprived of his liberty without the judgment of his peers,⁵ must be understood as

If public welfare require it, lunatics may be restrained of their liberty without previous trial by jury.

being controlled by the equally valid doctrine that the public welfare is the highest law. Hence, a lunatic may be restrained of his liberty without previous inquisition, warrant, or affidavit, if his disease requires seclusion or restraint; or if he have suicidal or homicidal tendency, thus being dangerous to himself or others; or if he have dangerous and uncontrollable propensities looking toward the destruction of property, incendiarism, or in any way menacing the community; or if he would be exposed to suffering for the want of food and shelter by wandering about and getting lost. Such a person will not be discharged from an asylum.⁶ On the obvious necessity of the case, the confinement without warrant of a person so insane that it would be dangerous to suffer him to be at liberty, is justifiable.⁷ It is just as competent to arrest an insane man who is committing a breach of the peace as a sane person under like circumstances; for, though an insane person can commit no crime, he may be lawfully prevented from doing harm.⁸

¹ Smith v. People, 65 Ill. 375, 378.

² State v. Ryan, 70 Wis. 676.

³ Conduit v. Soane, 5 Myl. & C. 111; Steed v. Calley, 2 Myl. & K. 52; Carter v. Carter, 1 Paige, 463.

⁴ Ex parte Evelyn, 2 Myl. & K. 3.

⁵ Commonwealth v. Kirkbride, 2 Brewst. 419, 421.

⁶ Ordronaux Jud. Asp. of Insanity, xxxix; Commonwealth v. Kirkbride, 3 Brewst. 586, 591.

⁷ Colby v. Jackson, 12 N. H. 526, 530; Davis v. Merrill, 47 N. H. 208; Van Deusen v. Newcomer, 40 Mich. 90.

⁸ Lott v. Sweet, 33 Mich. 309.

If the above principles are admitted, it results that there is no such thing as an indefeasible right of trial by jury, previous to the application of necessary remedies, even on the issue of insanity. Under the ancient common law, persons deprived of their reason might be confined till they recovered their senses, without waiting for the forms of a commission or other special authority from the crown.¹

A chancery court having jurisdiction in regard to idiots and lunatics may make provisional orders, when necessary, for the care of the lunatic's estate pending the proceedings under a commission.² In Louisiana, where, under the statute, the district judge has power, in a proceeding for interdiction, to appoint a temporary administrator to a person proceeded against for incapacity, pending the proceedings, it is held that such appointment exhausts the discretion of the judge, and he cannot rescind the appointment without cause.³ In England it is customary to appoint a receiver, where no person can be found to act gratuitously as committee of a lunatic,⁴ who, though receiving a salary, is considered a committee, and gives bond as such.⁵ So, also, if necessary in the preservation of a lunatic's estate, courts of equity in the United States, as well as in England, will appoint receivers;⁶ where, for instance, the estate is in unreliable hands, and before the commission in lunacy has been returned,⁷ or after the death of his committee, if there be conflicting claims as to who is entitled to the assets.⁸ But in such case the jurisdiction of chancery will be exercised only for the protection of personal assets; rival claimants to the real estate of the deceased lunatic will be relegated to the court having jurisdiction as if there were no lunacy.⁹ The receiver is liable to give bond, and may be called on to account at any time by any party in interest; and it is held in Tennessee that it is the duty of the receiver himself to account at least once every year.¹⁰

Court having jurisdiction may protect estate pending the commission,

or appoint a receiver.

¹ 4 Bla. 25.

² Wendell, *in re*, 1 Johns. Ch. 600, 603; Dey, *in re*, 9 N. J. Eq. 181, 182; Nailor v. Nailor, 4 Dana, 339, 346; Kenton, *in re*, 5 Binn. 613; *In re Harris*, 28 Atl. (Del.) 329, 330.

³ State v. Judge, 18 La. An. 523.

⁴ *Ex parte Radcliffe*, 1 Jac. & W. 619.

⁵ *Ex parte Warren*, 10 Ves. 622.

⁶ High on Receivers, § 733.

⁷ Matter of Kenton, 5 Binn. 613; Matter of Pountain, L. R. 37 Ch. Div. 609.

⁸ Matter of Colvin, 3 Md. Ch. 278, 288, citing the case of the Duchess of Norfolk, mentioned by Shelford, 210.

⁹ Carrow v. Ferrior, L. R. 3 Ch. App. 175, 178 *et seq.*

¹⁰ Lowe v. Lowe, 1 Tenn. Ch. 515.

§ 116. **Jurisdiction of the Inquisition of Lunacy.** — The writs *de idiota inquirendo*, originally issued (on information to the king that a person possessed of real estate was an idiot) to the escheator of the county,¹ and *de lunatico inquirendo* issued to the sheriff² (on information of lunacy) are now supplanted by commissions in chancery, and in America by proceedings in the nature of a commission, or inquisition, issued by a court of chancery or by a probate court, or court of probate jurisdiction. In by far the greatest number of States the jurisdiction over insane persons, or persons of unsound mind, is vested in probate courts *eo nomine*, for instance, in Alabama,³ Arizona,⁴ Arkansas,⁵ Connecticut,⁶ South Dakota,⁷ Idaho,⁸ Kansas,⁹ Maine,¹⁰ Massachusetts,¹¹ Michigan,¹² Minnesota,¹³ Missouri,¹⁴ Nebraska,¹⁵ New Hampshire,¹⁶ Ohio,¹⁷ Oklahoma,¹⁸ Rhode Island,¹⁹ South Carolina,²⁰ Utah,²¹ Vermont,²² and Wyoming;²³ or in courts or officers invested with similar jurisdiction, for instance, county courts in Colorado,²⁴ Illinois,²⁵ Kentucky,²⁶ North Dakota,²⁷ Oregon,²⁸ Tennessee,²⁹ Texas,³⁰ Virginia,³¹ and Wisconsin;³² the Court of Ordinary in Georgia,³³

¹ The escheator being a revenue officer and the profits of the lands of one found "*purus idiota*" going to the king. See *ante*, § 113.

² "I cannot find one writ directed to the escheator to inquire of lunacy. The escheator was an officer for the crown revenue, and in case of lunacy, where no profits go to the crown, the writ was never directed to the escheator:" Lord Hardwicke, in *Ex parte Southcote*, Amb. 109, 111.

³ Code, 1886, § 2390.

⁴ Rev. St. 1887, § 2156.

⁵ Dig. 1894, § 3814.

⁶ Gen. L. 1887, § 475.

⁷ Comp. L. 1887, § 5996.

⁸ Rev. St. 1887, § 5784.

⁹ Gen. St. 1889, § 3677.

¹⁰ Rev. St. 1884, ch. 67, § 4.

¹¹ Publ. St. 1882, ch. 139, § 7.

¹² How. St. 1882, § 6314.

¹³ St. 1891, § 5884. See also Laws, 1893, ch. 5, § 19.

¹⁴ Rev. St. 1889, § 5513.

¹⁵ Comp. St. 1891, ch. 34, § 14.

¹⁶ Publ. St. 1891, ch. 179, § 1.

¹⁷ Rev. St. 1890, § 6302; *Heckman v. Adams*, 50 Oh. St. 305, 313.

¹⁸ St. 1890, § 1593.

¹⁹ Publ. St. 1882.

²⁰ Concurrent with Common Pleas Court: Rev. St. 1893; *Walker v. Russell*, 10 S. C. 82. See Const. Art. IV. § 20.

²¹ Comp. L. 1888, § 4318.

²² Rev. St. 1894, § 2751.

²³ Rev. St. 1887, § 2287.

²⁴ Mills' Ann. St. 1891, § 2935.

²⁵ Rev. St. 1896, ch. 85, § 3.

²⁶ Concurrent with Circuit Court: St. 1894, § 2149.

²⁷ Rev. Code, 1895, § 6549.

²⁸ Gen. L. 1887, § 2889.

²⁹ Concurrent with Chancery: Code, 1884, § 4430. See *Cooper v. Summers*, 1 Sneed, 453, 457; *Oakeley v. Long*, 10 Humph. 254; *Albright v. Rader*, 13 Lea, 574.

³⁰ Rev. St. 1895, § 2735.

³¹ Concurrent with circuit and corporation courts: Code, 1887, § 1700. But see, as to jurisdiction of circuit courts, *infra*.

³² Ann. St. 1889, § 3976.

³³ Code, 1882, §§ 331; 1852.

Corporation Court in Virginia;¹ and in the Superior Court in California² and Washington,³ Supreme Court in New York;⁴ clerk of the Superior Court in North Carolina;⁵ district judge in Nevada;⁶ Court of Common Pleas in Pennsylvania⁷ and South Carolina,⁸ and in the circuit court in Florida,⁹ Indiana,¹⁰ Iowa,¹¹ Kentucky,¹² and Virginia;¹³ while in Delaware,¹⁴ Maryland,¹⁵ Mississippi,¹⁶ New Jersey,¹⁷ and Tennessee,¹⁸ the courts of chancery are intrusted with power similar to that possessed by the English Chancery Court over idiots, lunatics, and persons of unsound mind.

It has been held that equity courts in America take, in the absence of express statutory authority, a right from the Commonwealth, or State, the fountain of all power and authority, similar to that exercised by the Chancellor of England as a delegated prerogative right, in matters of lunacy, whenever it becomes necessary to exercise it for the protection of the persons and property of citizens;¹⁹ but the con-

Corporation Court.
Superior Court.
Supreme Court.
Clerk of Supreme Court.
District judge.
Court of Common Pleas.
Circuit Court.
Courts of chancery.

Derivation of chancery power.

¹ Concurrent with circuit and county court: Code, 1887, § 1700.

² Code Civ. P. 1885, § 1763.

³ Guardianship of Wetmore, 6 Wash. 271, 273.

⁴ Concurrent with County Court of the county: Bliss' Ann. C. 1890, Laws, 1874, ch. 446, tit. 2, § 1. But the Supreme Court exercises this power under the same rules as appertained to and regulated the jurisdiction of the Chancellor, subject to such statutory provisions on the subject as are contained in the Code of Procedure: Matter of Blewitt, 131 N. Y. 541, 546, referring to Code, § 2320 *et seq.* The acts of a county court, in removing a committee that had been appointed by the Chancery Court, and the jurisdiction over whom had vested in the Supreme Court, as well as the appointment of another person, and all subsequent proceedings, including a deed from the new committee to the purchaser of real estate under order of said court, are void: Scribner v. Qualtrough, 44 Barb. 431, 433.

⁵ Code, 1883, § 1670. In 1860 courts of equity were held to be without jurisdiction, which was then held to be in county courts: Dowell v. Jacks, 5 Jones Eq. 417.

⁶ Gen. St. 1885, § 1457.

⁷ Bright. Purd. Dig. 1885, p. 690, § 1.

⁸ Concurrent with probate courts: Walker v. Russell, 10 S. C. 82.

⁹ Rev. St. 1892, § 843 *et seq.*; see §§ 2110 *et seq.*

¹⁰ Rev. St. 1894, § 5743.

¹¹ McClain's Ann. Code, 1888, § 3463.

¹² Concurrent with county courts: St. 1894, § 2149.

¹³ Concurrent with county and corporation courts: Code, 1887, § 1700. But it is held that the jurisdiction of the Circuit Court does not arise until a county or corporate court has adjudged one insane, and it has then concurrent jurisdiction with such court to appoint a committee: Harrison v. Garnett, 86 Va. 763.

¹⁴ Rev. Code, 1874, ch. xlix. § 1; *In re Harris*, 28 Atl. 329.

¹⁵ Gen. L. 1888, Art. 16, § 96.

¹⁶ Ann. Code, 1892, § 2835.

¹⁷ Commission of idiocy or lunacy issues out of the Court of Chancery; but the proceedings are certified to the Orphan's Court, which also, on further application, appoints guardian.

¹⁸ Concurrent with county courts: Code, 1884, § 4430; if estate exceed \$500 in value: Albright v. Rader, 13 Lea, 574, 576.

¹⁹ Nailor v. Nailor, 4 Dana, 339, 340; Corrie's Case, 2 Bland Ch. 488, 492; Matter of Barker, 2 Johns. Ch. 232, 234

trary has also been decided, holding that an act conferring "equity" jurisdiction, such as had been "used and exercised" by the "Court of Chancery" under the colonial government, and such as is "rightfully and properly incident to such a court" does not confer the powers exercised by the Chancellor of England which the king confers by the sign manual.¹

The jurisdiction once acquired by a probate judge in an inquisition of lunacy continues until the discharge of the patient.² So

Jurisdiction ac-
quired con-
tinues. the court first exercising its jurisdiction, when concurrent with another court, retains it for all purposes connected with the matter; but this rule does not give

jurisdiction to the Court of Common Pleas, on the ground that a committee to a lunatic was appointed in said court, to direct the disposition of an award made for a lunatic's land taken in condemnation proceedings, where the statute requires the disposition of such award by the Supreme Court.³

¹ *Oakley v. Long*, 10 Humph. 254, 258. This case is cited by the court in *Fentress v. Fentress*, 7 Heisk. 428, 433, on the point that the Chancery Court of Tennessee acquired its jurisdiction under the statute, and has no general jurisdiction on the subject of unsoundness of mind. See also *Colvin, in re*, 3 Md. Ch. 278, 282.

² *Heckman v. Adams*, 50 Oh. St. 305,

315, holding that during all such time the judge may appoint a guardian; and that the time of making such appointment, or whether there is any necessity for it at all, is largely in the discretion of the probate judge.

³ *Matter of Guarino*, 35 N. Y. Supp. 409, 410.

CHAPTER XV.

OF THE INQUISITION OF LUNACY.

§ 117. **Application for the Inquisition.** — In the English Court of Chancery the writ *de idiota inquirendo* and *de lunatico inquirendo* issue on the petition of the attorney-general, or of any friend of the alleged lunatic or idiot, verified by affidavit of the facts alleged.¹ In America the statutes of the several States point out the persons who may petition for an inquiry into the state of mind of one alleged to be insane, or on account of some other mental incapacity incapable to manage his affairs, on sworn allegation of the facts. The persons so named are in most cases the relatives or friends of the alleged insane person; but in many States the information may, under the statute, be given by *any* person having knowledge of the facts; and such seems to be the law in the absence of a statutory provision on the subject.² In Colorado,³ the complainant must be a “reputable” person. In Louisiana,⁴ relatives, husband, or wife may petition for interdiction (interdicted persons are those who are subject to imbecility, insanity, or madness), or if such person has no relative or spouse, then any one may so petition. In Maine,⁵ the application may be by a friend, relative, creditor, or municipal officer, but cannot be by a wife.⁶ So in Alabama, where it is held that the wife cannot sue out an inquisition of lunacy in her own name, but must do so in the name of a next friend, who will be liable for the costs.⁷

Application for an inquisition may be made by relatives, friends, and in some States by any person.

¹ Busw. on Ins. § 58 and authorities.

² Baker v. Searle, 2 R. I. 115.

³ Mills' Ann. St. 1891, § 2935.

⁴ Voorh. Rev. Civ. C. 1889, Arts. 389, 390.

⁵ Rev. St. 1884, ch. 67, § 4.

⁶ For the purpose of having a guardian appointed: *In re Howard*, 31 Me. 552.

But in a subsequent case a complaint in writing made by the wife of an alleged insane person to the selectmen was held to be a sufficient basis for their action, on the ground that the wife is a *relative* within the intendment of the statute: *Insane Hospital v. Belgrade*, 35 Me. 497, 504.

⁷ Campbell v. Campbell, 39 Ala. 312.

In Mississippi,¹ any relative may apply, but if relatives and friends neglect, any citizen. In Connecticut,² where the statute requires the application to be made by the selectmen of the town or any relative, it is held that the appointment of a conservator, on the application of a private person not a relative, is void.³ In New Hampshire, under a similar statute, requiring the application to be by a relative or friend, or overseers of the poor, or by the overseers of the poor, the Supreme Court allowed the petition by selectmen to be amended by inserting the words "and overseers of the poor."⁴ So in most of the New England States, selectmen, mayor, overseers of the poor and other municipal officers are vested with the authority or duty to bring proceedings against, or for the protection of, persons of unsound mind. But a mere stranger, it is said, cannot sue out a commission, in the nature of a writ *de lunatico inquirendo*, nor to make himself a party by applying to the court, nor to interfere in any way in a proceeding of this nature.⁵ In Vermont, under a statute requiring the information to be by a friend or relative, it is held that an application by one not describing himself a friend in the petition, but resulting in an order of inquisition issued pursuant thereto, reciting that it had been made by the friend of the person proceeded against, gives jurisdiction as effectually as if it had been signed by a friend.⁶ So in Kansas, a warrant, issued by a justice of the peace against one charged with having made a felonious assault and being insane, and filed in the Probate Court, was held sufficient to give jurisdiction to the Probate Court.⁷ And in New York, where it is usual to require the petition to be accompanied by the affidavit of a physician, the court may in its discretion issue the writ on the affidavit of a layman.⁸

The petition should set forth the ground upon which the appointment of a guardian is asked for, so that the party may know the nature of the case she is to meet;⁹ a statement that the defendant "is mentally incompetent," "and has been some time past," giving this as a reason for the desired appointment of a guardian, has been

The application should set out the facts on which it is based.

¹ Ann. Code, 1892, § 2835.

² Gen. St. 1887, § 475.

³ *Hayden v. Smith*, 49 Conn. 83.

⁴ *Lord v. Walker*, 61 N. H. 261.

⁵ *Covenhoven's Case*, 1 N. J. Eq. 19,

⁶ *Cleveland v. Hopkins*, 2 Aik. 394, 397.

⁷ *In re Latta*, 43 Kans. 533, 537.

⁸ *Matter of Zimmer*, 15 Hun, 214.

⁹ *Gannon v. Doyle*, 16 R. I. 726.

held sufficient,¹ but a petition failing to show the facts upon which the statute authorizes the appointment of a guardian, does not confer jurisdiction on the court, and an appointment under such a petition is void.² It will appear from the consideration of the subject of the court's discretion on the question of ordering, or refusing a writ to issue, that the application should be sworn to.³

The petition can be filed only in the county in which the incompetent resides,⁴ but the jurisdiction of the court is not dependent upon the length of time the person has been in the county.⁵ It is held in New York, that the question of jurisdiction in these cases is to be decided upon the facts which appear to the court to which application is made at the time of making it. If the facts then made to appear are such as to call upon the court to determine whether they establish the existence of the jurisdictional facts, the jurisdiction exists.⁶

Application must be in the county of the lunatic's residence.

§ 118. **Discretion of the Court to order or refuse the Writ.** — The issuing of a commission or writ for an inquiry into the mental condition of an alleged person of unsound mind does not follow as a matter of right on the application, or information, filed. Even where the lunatic is of full age, and the lunacy manifest, the issuing of the commission does not follow of course; it will be issued only where it is required for the interest of the lunatic, or to protect the rights of others.⁷ The point for consideration is, whether a commission is really necessary for the benefit of the lunatic, with reference to his mental health and his property; and if the Chancellor be in doubt, he will postpone action on the petition and take the certificate of a physician as to the health of the patient.⁸ Before ordering the inquiry, the Chancellor should be satisfied in his own mind that there is probability

A commission of lunacy is not a matter of right;

it will be granted only when necessary for the protection of the lunatic,

¹ Norton v. Sherman, 58 Mich. 549, 552.

² Partello v. Holton, 79 Mich. 372, 377; Brown's Case, 45 Mich. 326; Fairfield v. Gullifer, 49 Me. 360. See Lawrence v. Willis, 75 N. C. 471 (an action to cancel a deed).

³ Post, § 118.

⁴ North v. Joslin, 59 Mich. 624, 646.

⁵ Cox v. Osage, 103 Mo. 385.

⁶ Southern Tier v. Landenbach, 5 N. Y. Supp. 901, 903, citing Miller v. Brinker-

hoff, 4 Denio, 119, in which this principle is announced in a case arising, in trespass, before a justice, and Skinnion v. Kelley, 18 N. Y. 355, a case of attachment, also before a justice of the peace.

⁷ Chattin, in re, 16 N. J. Eq. 496, 497; Owings' Case, 1 Bland Ch. 290, 294; Colvin's Case, 3 Md. Ch. 278, 282.

⁸ Tomlinson, in re, 1 Ves. & Beames, 57. See also Sherwood v. Sanderson, 19 Ves. 280, 289.

without regard
to the possible
consequences
on his previous
acts.

of insanity.¹ No regard to the possible consequences should be had as to the result of the commission upon his antecedent acts, or to the motives which may have prompted the proceeding.² In many States the language of the statute makes it the duty of the court (chancellor or judge of probate) to satisfy itself "that there is good cause for the exercise of its jurisdiction" before ordering an investigation of the facts alleged in the petition or information. So, for instance, in Arkansas,³ Kansas,⁴ Mississippi,⁵ Missouri,⁶ Texas,⁷ and Wyoming.⁸ But in Michigan it is held that the action of the probate judge in issuing citation to an alleged incompetent person, upon a petition alleging such incompetency and praying for the appointment of a guardian, does not involve the exercise of judicial discretion.⁹

In nearly all of the States the statutes provide that the petition or application must be verified, or accompanied by affidavit. The want of an affidavit in support of a petition for a commission of lunacy is said to be a conclusive reason to set aside the commission, if objected to in due season; but it does not render void the proceedings, if the objection is waived by going into the trial on the merits.¹⁰

Though it may be usual to require a petition to be accompanied by the affidavit of a physician before the court will direct a writ *de lunatico inquirendo* to issue, yet the court may, in its discretion, dispense with such affidavit, and issue the writ on the affidavit of a layman.¹¹

Where a guardian has been appointed to an infant of unsound mind, his control over the person and estate of the ward ought not to be interfered with on the ground that the ward labors under a double disability, except in cases of clear necessity; but infancy is no bar to the issuing of a commission.¹²

¹ Persse, *ex parte*, 1 Molloy, 219; Matter of Russell, 1 Barb. Ch. 38, 40; *In re Cope*, 7 Pa. Co. Court R. 406.

² Matter of J. B., 1 Mylne & C. 538.

³ Dig. 1894, § 3815.

⁴ Gen. St. 1889, § 3677.

⁵ Ann. Code, 1892, § 2215, referring to the appointment of guardians to drunkards and opium eaters.

⁶ Rev. St. 1889, § 5513.

⁷ Sayles' Civ. St. 1888, Art. 2653.

⁸ Rev. St. 1887, § 2287. And to satisfy itself, the court may require the party to be brought before it: § 2289.

⁹ Estate of Leonard, 95 Mich. 295, 300.

¹⁰ Lincoln, *in re*, 1 Brewster, 392, 395. To same effect: *Bethea v. McLennon*, 1 Ired. L. 523, 526; *Guthrie v. Guthrie*, 84 Iowa, 372, 375; *Royston's Appeal*, 53 Wis. 612, 618; *State v. Day*, 57 Wis. 655, 660.

¹¹ Zimmer, *in re*, 15 Hun, 214.

¹² In *Southcot, ex parte*, an instance is

There seems to be no necessity to inquire into the subject of the right to the carriage of a commission of lunacy. The English rule is stated to be that the matter is entirely within the discretion of the court, and that the party will be selected to conduct the proceedings who is most likely to bring out the whole truth; other things being equal, the preference is ordinarily given to the nearest of kin to the alleged lunatic.¹ But it is said that a court should not proceed to the appointment of a guardian on the application of a friend of one who has near relatives with whom he lives, or who have the care of him, unless it appears from the petition that there is some good reason why the application is not made by such relatives.² A person making complaint in a proceeding to have one declared of unsound mind and incapable of managing his affairs, cannot dismiss such proceeding without the consent of the court before whom the same is pending; and, as a rule, such consent ought not to be given against the objection of the person alleged to be of unsound mind.³

Carriage of the commission is given to party most likely to bring out the truth.

kin to the

Good cause should be shown why application is made by a distant relative when there are nearer of kin.

Proceedings cannot be dismissed without consent of court.

§ 119. Notice to the Party alleged to be of Unsound Mind. — In England, where it was held previous to the Lunacy Regulation Act⁴ to be a matter of right that a party who has been found insane is allowed to traverse the finding and obtain the verdict of a jury upon the facts and evidence produced;⁵ and in those American States where the like practice prevails, the giving of notice to the person who is to be examined is not absolutely necessary on the score of justice. The traverse, indeed, was originally granted because the inquest under the commission of lunacy is in theory a proceeding to which the alleged lunatic is not a party.⁶ But the existence

Notice not essential where traverse is a matter of right.

mentioned where a commission was ordered to inquire into the lunacy of one Halse, who was also an infant: 2 Ves. Sen. 401, 404. So Lord Eldon mentions a similar case in *Sherwood v. Sanderson*, 19 Ves. 280, 289; *Chattin, in re*, 16 N. J. Eq. 496, and authorities cited.

¹ Busw. § 61, and authorities.

² Appeal of Royston, 53 Wis. 612, 624.

³ *Galbreath v. Black*, 89 Ind. 300.

⁴ 25 & 26 Vict. c. 86.

⁵ See *post*, § 127, on the subject of the traverse.

⁶ "If he has not contested the matter before the jury by himself, or any counsel, solicitor, or agent on his behalf, it would surely be in principle monstrous to say that he is not entitled as of right to dispute the finding, nor do I understand law and principle, or in other words, law and justice, to differ in this respect:" Lord Justice Knight Bruce, in the leading case of *Cumming, in re*, 1 De G. Mac. & G.

It is not inconsistent with the right to traverse.

But will be dispensed with if shown to be dangerous to the lunatic

by proper proof.

of the right to traverse is not inconsistent with the propriety of giving notice, if the purposes of justice are subserved thereby.¹ But if the service of the notice might be attended with danger to the lunatic or others, notice will be dispensed with;² the affidavit of the medical superintendent of an asylum in which the lunatic is confined, is not sufficient to justify the court in dispensing with notice in such case; it should be corroborated by disinterested persons.³

In the United States it is generally considered to be the privilege of a party against whom a commission of lunacy is issued to

Rule as to notice in the United States.

have notice of, and to be present at, its execution,⁴ unless peculiar circumstances render it improper or unsafe to give such notice, in which case such facts should be stated in the application, so that a provision may be inserted in the commission dispensing with the notice.⁵ The question whether notice or not is necessary is mostly put to rest by statute in the several States. It may, however, be laid down as a fundamental principle of

Generally fixed by statute.

537, 556. See an interesting discussion of the power of the Scotch Court of Sessions to refuse a trial by jury to one alleged to be fatuous, and over whom they had appointed a curator *bonis*, by the members of said court, and by the Lord Chancellor on appeal to the House of Lords, in *Bryce v. Graham*, 2 Wils. & S. 481, 512 *et seq.*

In South Carolina, the statute of 2 & 3 Edw. VI. ch. 8, § 6, giving any person aggrieved by being unduly found lunatic or idiot his traverse, is held to be in force as being one of such statutes "as declare the rights and liberties of the subject:" and accordingly the courts follow the English doctrine, holding notice unnecessary, because the inquest is regarded as an *ex parte* proceeding: *Medlock v. Cogburn*, 1 Rich. Eq. 477.

In Indiana, notice is held not necessary if the party is present at the trial; but the proceeding is void, if he had no notice, and was neither present nor represented by counsel: *Martin v. Motsinger*, 130 Ind. 555, 558.

In Illinois, where the statute requires ten days' notice to be given, an inquest was held void collaterally because it ap-

peared from the record that but nine days' notice was given; though the party was present and himself conducted the cross-examination at the trial. The court expressly held that *an insane man* can waive no irregularities: *Behrensmeyer v. Kreitz*, 135 Ill. 591, 638. — In Maine, where the statute does not expressly require notice to be given to the defendant of the inquisition by the selectmen (before proceeding in the Probate Court) it is held that the want of such notice is a valid objection to further proceeding in the Probate Court: *Holman v. Holman*, 80 Me. 139.

¹ *Rex v. Daly*, 1 Ves. Sen. 269; *Hall, ex parte*, 7 Ves. 261; *Miller, in re*, 1 Ch. Ch. (Canada) 215; *Mein, in re*, 2 Ch. Ch. (Can.) 429, 430.

² *Patton, in re*, 1 Ch. Ch. (Can.) 192.

³ *Newman, in re*, 2 Ch. Ch. (Can.) 390.

⁴ In the *Matter of Tracy*, 1 Paige, 580; In the *Matter of Russell*, 1 Barb. Ch. 38, 39; In the *Matter of Whitenack*, 3 N. J. Eq. 252, 253; *Matter of Blewitt*, 131 N. Y. 541, 546.

⁵ *Matter of Tracy, supra*, and authorities, *supra*.

justice, essential to the rights of every man, that even in the absence of express statutory requirement, he shall have notice of any judicial proceeding, for the purpose of divesting him of his property, or of its control, that he may appear and defend his right; and that an inquisition which, if the court has jurisdiction, is conclusive, is void and of no effect, if notice had not been given.¹

Independent of statute, no judgment of a court is valid, if rendered without notice to the party.

“No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party;”² hence, such judgment is a violation of the Fourteenth Amendment to the Constitution of the United States.³ But in Iowa it is held that neither the State Constitution⁴ nor the Fourteenth Amendment to the United States Constitution is applicable to the proceeding to establish insanity.⁵

The court is affirmatively required to cause the party alleged to be of unsound mind to be served with notice of the intended inquisition, for a period of from five to twenty days in Arizona,⁶ California,⁷ Connecticut,⁸ North Dakota,⁹ Idaho,¹⁰ Indiana,¹¹ Massa-

Courts required by statute to cause notice to be given.

¹ *McCurry v. Hooper*, 12 Ala. 823; *Eslava v. Lepretre*, 21 Ala. 504, 522; *Molton v. Henderson*, 62 Ala. 426, 430; *Chase v. Hathaway*, 14 Mass. 222, 224; *Eddy v. People*, 15 Ill. 386; *Hutchins v. Johnson*, 12 Conn. 376, 382; *Stafford v. Stafford*, 1 Martin, N. S. 551; *Dozier, ex parte*, 4 Baxt. 81; *Smith v. Burlingame*, 4 Mason, 121; *Interdiction of Dumas*, 32 La. An. 679 (Per Bermudez, C. J.), 685; *Shumway v. Shumway*, 2 Vt. 339; *McAfee v. Commonwealth*, 3 B. Mon. 305; *Lance v. McCoy*, 34 W. Va. 416, 418, affirmed in *Evans v. Johnson*, 39 W. Va. 299, 302, with many authorities cited; *North v. Joslin*, 59 Mich. 624, 646, citing numerous American cases.

² Gray, J., pronouncing the opinion of the court in *Scott v. McNeal*, 154 U. S. 34, 46.

³ To same effect as *Scott v. McNeal*, *supra*: *Martin v. Motsinger*, 130 Ind. 555, 558; *Matter of Janes*, 30 How. Pr. 446; *Jessup v. Jessup*, 7 Ind. App. 573; *May's Case*, 10 Pa. Co. C. 283.

⁴ Providing that “in all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public

trial by an impartial jury; to be informed of the accusation against him; to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and to have the assistance of counsel:” Constitution of Iowa, as cited in *Black Hawk County v. Springer*, 58 Iowa, 417, 418.

⁵ *Black Hawk County v. Springer*, *supra*; *Chavannes v. Priestly*, 80 Iowa, 316, 317.

⁶ Rev. St. 1887, § 1337.

⁷ Code Civ. Pr. § 1763.

⁸ Gen. St. 1887, § 476.

⁹ Rev. Code, 1895, § 6549.

¹⁰ Rev. St. 1887, § 5784.

¹¹ In the case of drunkards, summons to be issued: Ann. Rev. 1894, § 5743. No such summons is required by statute, as a pre-requisite in a proceeding to have a person adjudged to be of unsound mind: *Martin v. Motsinger*, 130 Ind. 555, 557 (citing *Hutts v. Hutts*, 62 Ind. 214, 220, and *Nyce v. Hamilton*, 90 Ind. 417, 419); but notice, appearance, or representation is held indispensable under the Constitution of the United States: p. 558; and see *Jessup v. Jessup*, 7 Ind. App. 573, 578.

chusetts,¹ Michigan,² Minnesota,³ Missouri,⁴ Montana,⁵ Nebraska,⁶ Nevada,⁷ New Hampshire,⁸ Ohio,⁹ Oklahoma,¹⁰ Oregon,¹¹ Utah,¹² and Wisconsin.¹³

It is held in New York, that if notice be necessary by the party's parents (which is held to be doubtful) it need not be of the constitution of the commission; it is sufficient to give jurisdiction to the court, if the party have notice of the time and place of the execution of the writ; and that, while he ought to have notice of the motion to confirm the finding of the jury and for the appointment of the committee, yet the failure to give such notice does not render the proceedings void.¹⁴

In Georgia there is no provision for notice to the person to be examined, but notice to three of his nearest of kin is required, or proof that there are none such in the State; and if the application is by them, there must be notice to the three next nearest of kin, all of which must appear affirmatively from the record.¹⁵ So in New York notice must be given to the husband or wife, if any, or to one or more relatives, or to the overseer of the poor.¹⁶ And in Ohio the applicant must give notice to his next of kin residing in the county.¹⁷ In Pennsylvania, the court is directed

¹ Publ. St. 1882, ch. 139, § 7.

² Howell's St. 1882, §§ 6314, 6318.

³ St. 1891, § 5755.

⁴ Rev. St. 1889, § 5515: "Unless the Probate Court order such person to be brought before the court, or spread upon its records the reason why such notice or attendance was not required." It is held under this statute, that it is irregular to proceed with the inquiry into the soundness of mind of one alleged to be incompetent to manage his affairs without notice to him, or an order to produce him before the court, or spreading upon its record the reason why such order was not made; but that the proceedings in such cases are not like a final judgment, unalterable after the term at which it was rendered; they are like a cause pending, and irregularities or defects in the record may be obviated at any time, so long as the lunatic is under the control of the guardian appointed for him: *Dutcher v. Hill*, 29 Mo. 271, 274. Hence, the court may at a subsequent term set aside its

judgment adjudging a person insane; and it is sufficient ground for setting aside such judgment that it does not appear from the record that the alleged insane person was notified of the proceeding against him, and if not notified, the reason therefor: *Matter of Marquis*, 85 Mo. 615.

⁵ Comp. St. 1888, Prob. Pr. Act, § 364.

⁶ Comp. St. 1891, ch. 34, § 14; also § 17.

⁷ Gen. St. 1885, § 560.

⁸ Publ. St. 1891, ch. 179, § 2.

⁹ In cases of inquisition against drunkards: Rev. St. 1890, § 6318.

¹⁰ St. 1890, § 1593.

¹¹ Code and Gen. L. 1887, § 2889.

¹² Comp. L. 1888, § 4318.

¹³ Ann. St. 1889, §§ 3976, 3978.

¹⁴ *Gridley v. College*, 137 N. Y. 327, 330.

¹⁵ *Marton v. Sims*, 64 Ga. 298, 301.

¹⁶ *Bliss' An. Code*, 1890, § 2325. But the failure to give the notice is not jurisdictional, but an irregularity that may be cured: *Matter of Demelt*, 27 Hun, 480.

¹⁷ Rev. St. 1890, § 6302.

to cause notice to be given to the party, *or* his near relatives or friends not concerned in the application.¹ In Vermont notice must be given at least twelve days, and if the party is absent from the State, twenty days; in case of a married woman, also to the husband.² And in West Virginia, where the statute requires notice to be given to one suspected to be insane, before the Circuit Court can appoint a committee to him, but makes no provision for notice in similar proceedings in the County Court, it is held that the two statutes should be read together; and that neither the County nor the Circuit Court can make such appointment without notice.³

Notice in West Virginia.

Service of the notice should, it seems, be made by reading or delivering a copy to the party in person; or at least in the manner pointed out by statute for the service of citations or subpoenas.⁴ In Alabama the service of the writ of arrest is the only notice to which the party proceeded against as a lunatic is entitled in order to give the court jurisdiction over him.⁵ And if such person is a resident of the county and confined in a hospital or asylum, no notice is necessary for the appointment of a guardian.⁶ Service upon a guardian *ad litem* is insufficient.⁷ The fact that a wife told her husband on the day before the inquisition, that she had applied to the court to have a committee appointed, was held not notice.⁸ The statute of Connecticut directs service to be made at the respondent's usual place of abode; it was held, under this statute, that service upon one who was at the time confined in jail, was sufficient by leaving a copy with him at the jail.⁹ But where the case was adjourned to another day, and the court appointed a conservator before that day, on the consent of the respondent, he cannot be precluded from being heard against the appointment on the day to which the hearing had been adjourned.¹⁰ Proof of notice

Service of notice must be in mode pointed out by statute.

In Alabama.

In Connecticut.

In Missouri.

¹ Bright. Purd. Dig. p. 1126, § 7. Hinchman, *ex parte*, 4 Pa. Law J. R., 268. Failure to give the notice to defendant is sufficient cause to set aside proceedings in lunacy, notwithstanding service had on a friend not concerned in the application: Commonwealth v. Groh, 10 Pa. Co. C. 557.

² Rev. St. 1880, § 2438.

³ Lance v. McCoy, 34 W. Va. 416, 418.

⁴ Segur v. Pellerin, 16 La. 63, 67; Interdiction of Dumas, 32 La. An. 679, 686.

⁵ Fore v. Fore, 44 Ala. 478, 483.

⁶ Ala. Code, 1886, § 2396.

⁷ Gernon v. Dubois, 23 La. An. 26.

⁸ Matter of Blewitt, 131 N. Y. 541, 548.

⁹ Dunn's Appeal, 35 Conn. 82, 84.

¹⁰ Dunn's Appeal, *supra*.

served forms a part of the record proper; but the recital that "due notice" had been given to the alleged insane person may be rebutted.¹

In New Jersey ten days' notice is prescribed by the Court of Chancery, unless for special reasons the Chancellor order otherwise. Service of notice in due time on the brother of the respondent, in whose house she resided, and who refused admission of the officer to the respondent, also on the attorney who had formerly represented the party in similar proceedings, and appearance by said attorney without objecting to the sufficiency of notice, was held sufficient in the absence of proof that neither of the notices reached the alleged lunatic.² It was also held in Connecticut, that although the record of the Probate Court show sufficient service, this record may be contradicted by parol testimony.³ The commission should always have a return day named therein; but if the party appear and proceed to trial without moving to quash, it is too late to object, after verdict, on the ground that no return day was named.⁴

Notice to relatives of a lunatic is held, in New York, not to be essential to the validity of a proceeding in lunacy. The failure to give such notice is, at most, an irregularity, and will be deemed waived unless he takes advantage of it immediately upon his having knowledge of the proceeding.⁵ The requirement of notice to the husband or wife does not dispense with the right of the alleged lunatic to have notice also.⁶ Where notice to the next of kin is required to be given, as well as to the person alleged to be incompetent, the failure to give notice to non-resident heirs does not render void the decree adjudging him insane, if notice was given to the next of kin residing in the State;⁷ and where service of notice was had on minor heirs under guardianship the want of service on their guardians is not fatal to the jurisdiction of the court.⁸

New notice is not necessary, if the party, having had notice,

¹ *Crow v. Meyersick*, 88 Mo. 411.

⁶ *Matter of Blewitt*, 131 N. Y. 541,

² *Lindsley's Case*, 46 N. J. Eq. 358, 360.

⁷ *Munger v. Judge*, 86 Mich. 363, 366; see also *Bassett, in re*, 68 Mich. 348; *Myers, in re*, 73 Mich. 401.

³ *Sears v. Terry*, 26 Conn. 273, 282.

⁴ *Lincoln, in re*, 1 Brewst. 392, 393.

⁵ *Matter of Rogers*, 9 Abb. N. C. 141, 142. See also *Southern Tier v. Landenbach*, 5 N. Y. Supp. 901, 903.

⁸ *Munger v. Judge, supra*.

appears, and the case is adjourned from time to time, to give the court jurisdiction for the appointment of a guardian.¹

Notice not necessary for adjourned trial.

§ 120. *Venue of the Inquisition or Trial.* — In England the uniform course was, according to the statement of Lord Eldon, to execute the commission of lunacy in the place of the lunatic's residence, citing Lord Hardwicke for authority.² But the violation of the Chancellor's order directing the commission to be executed at the place of abode is not of itself a conclusive ground to quash the inquisition;³ and if sufficient reason be shown, the commission might be directed into another county.⁴ In the case of Smith, *ex parte*,⁵ Lord Eldon remarked, that "the old and settled law is, that I cannot grant a commission of lunacy to be executed in any other place than the residence of the supposed lunatic. . . . The reason of the inquiry, usual at all times, from what period the lunacy commenced, is this, that when it appears that the lunacy is of some duration, and that the lunatic has performed acts, the principle on which the crown extends its protection requires that an examination shall be instituted into the circumstances under which those acts were performed."⁶ But if the inquiry is as to one beyond sea, the commission may be directed where the mansion and greater part of the estate lay.⁷

The English rule required execution of the commission at the place of the lunatic's residence.

Except as to one beyond sea.

In America, the county, or the territorial jurisdiction within which the inquisition is to be had, is in most instances pointed out by the statute, and may be stated in a general way to be the county or district in which the person

In America in the county of the lunatic's residence.

¹ Davison v. Johonnot, 7 Metc. (Mass.) 388, 397.

² Baker, *ex parte*, 19 Ves. 340.

³ Hall, *ex parte*, 7 Ves. 261, 264.

⁴ Waters, *in re*, 2 Myl. & Cr. 38. Two other cases are mentioned by the American editor of Mylne and Craig's Reports in a note to this case, in which the commissions were ordered to another county for the convenience of the witnesses.

⁵ 1 Swanst. Ch. 4.

⁶ The Chancellor refused to send the commission into the county to which the lunatic had been removed for medical treatment, although there were affidavits from the lunatic's mother and the physi-

cians under whose care she had placed him, that the removal would endanger his life. There was no dispute as to the patient's insanity, but only as to the time of its origin, the relatives attempting to annul his marriage on the ground that he was insane at the time.

⁷ Southcot, *ex parte*, 2 Ves. Sen. 401. Lord Hardwicke had grave doubts of his power to make such order, because under the law the commissioners and jury have a right to inspect the person of the lunatic, and to examine him, but finally concluded to assume the power, reasoning that no mischief could arise from it.

of alleged unsound mind is domiciled.¹ Where the statute gave jurisdiction to "the Court of Probate in the district in which such person resides," it was held that this language meant *actual*

In some States meaning actual residence in contra-distinction to general domicil. *residence* in the probate district, — as contra-distinguished from general domicil; and that the appointment of a conservator over a person whose domicil was within the district, and upon whom service was

had by leaving notice there, but whose actual residence was, at the time of serving said notice, in another State, where notice was not served upon him, was void; and that these facts might be shown by parol evidence.² A similar decision was rendered in Louisiana, in a thoroughly considered case and after a searching review of the authorities. It is there held that a suit for interdiction must be brought at the *actual* domicil of the defendant, — not at his merely legal or constructive domicil, that a court cannot issue its process in a personal action on a person actually residing beyond its territorial limits and within those of a different sovereignty, and that service of a citation issued by a State court cannot be made in a foreign country by the American consul.³

The subject of the settlement of paupers has given rise to considerable litigation, and two principles of law are said to be well established, which throw light on the question of jurisdiction over persons of unsound mind: first, Lunatic can acquire no domicil by his own act. that an idiot (or person of unsound mind) can acquire no residence or settlement in any place by virtue of his own acts; and next, that a person having acquired a legal settlement in one place, that settlement continues until he acquires a legal settlement in another place in the State.⁴

But in New Jersey the commission may be executed in the county where the mansion and estate of the alleged lunatic are, or where he last resided, though he be an inmate of a lunatic asylum in another county at the time of the proceeding.⁵ So in Pennsylvania: The commission is to be executed in the county of the alleged lunatic's residence, if he reside within the commonwealth, unless he be restrained in any place within the commonwealth in another

¹ *Castleman v. Castleman*, 6 Dana, 55; *Campbell's Case*, 2 Bland Ch. 209, 217.

² *Sears v. Terry*, 26 Conn. 273, 281.

³ *Interdiction of Dumas*, 32 La. An. 679.

⁴ *Payne v. Dunham*, 29 Ill. 125.

⁵ *Matter of Child*, 16 N. J. Eq. 498.

county, and it appears that he cannot be conveniently removed to the place of his residence, when it may be executed in the county where he is restrained.¹ If he have no residence in the commonwealth, then it may be executed where he may be found;² and if he be absent from the commonwealth, then in the county where his last place of residence was.³ It was held in an early Pennsylvania case, that the commission issued out of a county in which was the legal residence of the lunatic, and her entire estate, although, for the purpose of medical treatment, she was confined in an asylum in another county at the time, excludes a subsequent commission issued from the county in which the asylum was situated in which she was confined.⁴ In South Carolina the inquisition of lunacy is usually executed In South Carolina. at the residence of the supposed lunatic; or in the vicinage; but it is within the discretion of the judge or Chancellor to order it to be executed in another district.⁵ In Missouri, Jurisdiction not dependent on length of time the lunatic has been in the county. where the statute confers jurisdiction *de lunatico inquirendo* on the Probate Court, "if information in writing be given . . . that *any person in its county* is an idiot," &c., it is held that the jurisdiction is not dependent on the length of time he has been in the county.⁶

§ 121. **Presence of the Party at the Inquest.** — The presence of the party before the court or commission inquiring into the soundness or unsoundness of his mind is important in two respects: It is, on the one hand, the corollary of the right to notice,⁷ which, without the right to be present at the proceeding, would be but a cruel mockery and unmeaning ceremony. Indeed it is unimportant whether the party had notice or not, if he was present in open court (as required in many States by statute), or represented by counsel, at the proceeding on the inquisition; or whether he was produced by order of the court, or by the party having filed the information, or appeared voluntarily, if in any of these events he had the opportunity to defend himself and protect his rights. If he appears by counsel, he will not be heard to object that he was incompetent to appoint him, because such contention would Party should be present at the trial. Right to be present conditions notice. Appearance by counsel sufficient.

¹ Bright. Purd. Dig. 1883, p. 1125, § 2, pl. I.

² *Ib.*, pl. II.

³ *Ib.*, pl. III.

⁴ Matter of O'Brien, 1 Ashm. 82.

⁵ Wilson, *ex parte*, 11 Rich. Eq. 445.

⁶ Cox v. Osage, 103 Mo. 385, 388.

⁷ See *ante*, § 118.

be the assertion of the very fact he would controvert, and to prove which was the sole object of the whole proceeding.¹ As a matter of course, the presence of the party does not cure want of notice if he was brought into court or before the inquest for the mere purpose of exhibition (although such is one of the purposes of the law requiring or allowing his presence) without securing to him full opportunity to defeat the proceeding, if he can, by showing it with the aid of counsel, or witnesses, or both, to be defective in form or unfounded in substance.²

Party must
have opportunity
to defend.

The party's presence is important, on the other hand, to enable the jury or commission to see and examine him. It is obvious that the features of the person alleged to be of unsound mind, — particularly the expression of his eyes, — as well as his behavior in court, and the answers he may make or refuse to make to questions put to him by counsel, judge, or jurors, may afford important aid to the triers, often, indeed, constituting the most reliable evidence of the party's mental condition, because it comes to them through the medium of their own eyes and ears. The presence of the respondent or defendant before the triers avoids, also, the possible danger that witnesses may be testifying concerning a different person. It is for these reasons that statutes require such presence, or give power to the judge to order him to be brought before the court, or give the jurors or triers the right to demand an inspection and examination.³

And the jury to
see and exam-
ine him.

And the wit-
nesses to iden-
tify him

¹ *Martin v. Motsinger*, 130 Ind. 555, 559. To same effect: *Lackey v. Lackey*, 8 B. Mon. 107; *Nyce v. Hamilton*, 90 Ind. 417. Appearance without objecting to the sufficiency of the notice waives the objection: *Vanauken, in re*, 10 N. J. Eq. 186, 190.

But the contrary is held in a late Illinois case, where the statute requires ten days' notice to be given of a proceeding to ascertain whether a person be a lunatic or distracted. In *Behrensmeyer v. Kreitz*, 135 Ill. 591, 638, the record of such a proceeding showed only nine days' service of notice on the party proceeded against, but his presence at the trial conducting the cross-examination, and that the respondent was found to be insane. The

court held this record inadmissible as evidence showing insanity of such party, being void for the want of notice according to the statute; and that the appearance of the party, and the fact that he conducted his own defence at the trial, did not cure the defect, because an insane man is incompetent to waive any right. Query: Was not the party in law to be deemed sane, until the contrary appeared? And if the contrary appeared, why was not the record, showing this, competent evidence?

² *Hinchman v. Ritchie*, Bright. 143, 180 *et seq.*, note; *Whitenack, in re*, 3 N. J. Eq. 252; *Morton v. Sims*, 64 Ga. 298.

³ See *Jones v. Van Gundy*, 16 Ind. 490.

Whether counsel, or any other person should be allowed to be present at the personal examination of the alleged lunatic, was considered by the Chancellor in a recent case in New Jersey.¹ The conclusion was reached that the commissioners and jurors might exclude all other persons, including counsel.²

Jury may exclude counsel during examination.

But however desirable, the presence of the party is not absolutely necessary to the validity of the proceedings if he had due notice.³ It is readily seen, that while a trial or inquisition without notice and in the absence of the party may on constitutional grounds be void in law, such a trial or inquisition without the party's presence, if he had due notice, can be avoided only on proof of fraud, or forcible restraint to prevent him from properly defending himself. His mere absence, though in consequence of forcible detention in an asylum or other place of confinement, is no more a ground of objection to the validity of the proceeding than the absence of the defendant in any civil case; and a judgment or decree in such case can be collaterally assailed only, like any other judgment or decree, on proof that the detention was with fraudulent intent. To guard, in some measure, against the danger of such frauds, the statutes in many States forbid the detention of any person on the ground of lunacy, in any asylum or hospital, without decree or judgment of a chancellor or judge, after due examination and sufficient proof; and with the like intention, guardians *ad litem* are generally appointed for the protection of parties restrained of their liberty.

Presence of party not essential to validity of the inquisition,

but may be avoided on proof of fraudulent detention.

It is by statute made the duty of the court to cause the person alleged to be of unsound mind to be brought before it in Arizona,⁴ Arkansas,⁵ Florida,⁶ Idaho,⁷ Illinois,⁸ In-

¹ Lindale's Case, 46 N. J. Eq. 358, 363.

² The reason given is, "that the commissioners and jurors may be at liberty to exercise their own discretion." The Chancellor quotes the opinion of Lord Cottenham in the Matter of J. B., 1 Myl. & C. 538, 542, and Shelf. on Lun. 121, the latter as saying that "the lunatic ought also to be examined by the master in lunacy, or jury, *all other persons being absent.*" But where permission was given to counsel on both sides to be present at such

examination, one who refused consent for both to be present cannot be heard subsequently to complain that he was excluded; Ib. p. 363. The words imputed to Shelford have not, it may be remarked, been found on the page quoted.

³ Matter of Child, 16 N. J. Eq. 498; *Fiscus v. Turner*, 125 Ind. 46, 49.

⁴ Rev. St. 1887, § 2156.

⁵ Dig. 1894, § 3815.

⁶ Rev. St. 1892, § 843.

⁷ Rev. St. 1887, § 5784.

⁸ Rev. St. 1889, Ch. 85, § 2.

States requiring the judge to cause alleged lunatic to be brought before him,

unless it appear that he cannot be produced with safety.

diana,¹ Montana,² Nevada,³ Oklahoma,⁴ Texas,⁵ Utah,⁶ Washington,⁷ and Wisconsin;⁸ and such party is required to be present, or may be ordered by the court to be present, in California,⁹ Kansas,¹⁰ Kentucky,¹¹ and Missouri.¹² In most of these statutes exception is made for cases where the party cannot with safety to himself or others be produced in court or before the commission or jury. In Kentucky the presence of the party on trial cannot be dispensed with, unless it be shown by the affidavit of two physicians that he is insane, and that it would be unsafe to bring him into court; to proceed in the absence of the party, without such affidavits, is held manifestly irregular and erroneous.¹³ In Ohio it is made the duty of the probate judge to issue his warrant for the person charged with insanity and have him brought before him; and if such person cannot be present before the court, the judge must personally visit him, and certify that he has ascertained the condition of the person by actual inspection, and thereupon the inquest may proceed without his presence.¹⁴

Proceedings without notice are void, if court had not jurisdiction; voidable if it had.

Whether proceedings without notice to and in the absence of the party alleged to be of unsound mind, are void, and hence impeachable collaterally, or voidable so as to be valid until set aside in a direct proceeding for that purpose, depends upon the further question, whether by the law of the State under which the proceedings were had, the court possessed jurisdiction to pronounce the judgment or decree in the matter. The grant of guardianship is held void in Massachusetts, if it does not appear that notice had been given to the subject of it before inquisition had.¹⁵ So in Alabama,¹⁶ Arkansas,¹⁷ Illinois,¹⁸ and West Virginia.¹⁹

¹ Ann. Rev. 1894, § 2715.

² Const. & C. 1895, § 2970, Code Civ. Pr.

³ Gen St. 1888, § 1457.

⁴ St. 1890, § 1593.

⁵ Sayles' Civ. St. 1888, § 2653.

⁶ Comp. L. 1888, § 4318.

⁷ Wetmore, *in re*, 33 Pac. R. 615.

⁸ Ann. St. 1889, § 3976.

⁹ Code Civ. P. 1885, § 1763.

¹⁰ Gen. St. 1889, § 3679.

¹¹ St. 1894, § 2157.

¹² Rev. St. 1889, § 5515.

¹³ McAfee v. Commonwealth, 3 B. Mon. 305.

¹⁴ Heckman v. Adams, 50 Oh. St., 305, 314.

¹⁵ Wait v. Maxwell, 5 Pickering, 217, 219; Chase v. Hathaway, 14 Mass. 222, 225.

¹⁶ McCurry v. Hooper, 12 Ala. 823, 827; Molton v. Henderson, 62 Ala. 426, 430.

¹⁷ Arrington v. Arrington, 32 Ark. 674.

¹⁸ So held in Behringsmeyer v. Kreitz, 135 Ill. 591, 638.

¹⁹ Lance v. McCoy, 34 W. Va. 416, 419.

On the other hand, the want of notice has been held to render the proceedings voidable but not void collaterally, in Iowa,¹ Missouri,² North Carolina,³ Pennsylvania,⁴ New Hampshire,⁵ and Vermont.⁶ It would result on principle, from what is said on the subject of notice to the party,⁷ that under the provisions of the Fourteenth Amendment to the Constitution of the United States, as well as on fundamental principles of justice, no man can be bound by a judicial proceeding at which he was not present nor represented, and of which he had no notice.⁸

The right of one proceeded against as an insane or incompetent person to defend, and therefore to appear in person or by attorney, has been expressly decided in Wisconsin,⁹ and impliedly so in Indiana.¹⁰

§ 122. **Commissions of Lunacy in Chancery.** — There were in England, in the days of Lord Hardwicke, two forms of writ for inquiring into the mental capacity of an alleged *non compos*, — the writ *de idiota inquirendo* and the writ *de lunatico inquirendo*, to which was added, in the times of Lord Eldon, a writ in the nature of writs *de lunatico*, wherein it was not necessary to establish lunacy, but simply that the party was of unsound mind and incapable of managing his affairs.¹¹ These writs, in the United States as well as in England, are issued out of chancery, or other court having the requisite jurisdiction, requiring those to whom they are directed to inquire concerning the state of mental capacity of the alleged person of unsound mind, and to certify the result by inquisition.¹² They are addressed to either a special commission, or to permanent commissioners in lunacy, who address a precept to the sheriff requiring him to summon a jury to inquire into the question of the alleged lunacy of the person mentioned in the petition. The num-

Writs in the nature of writs *de lunatico inquirendo* issue out of chancery to ascertain whether the party is of unsound mind and incapable of managing his affairs.

¹ Ockendon v. Barnes, 43 Iowa, 615, 616.

² Dutcher v. Hill, 29 Mo. 271, 273; but see Matter of Marquis, 85 Mo. 615.

³ Bethea v. McLennon, 1 Ired. L. 523, 526.

⁴ Rogers v. Walker, 6 Pa. St. 371, 373; Willis v. Willis, 12 Pa. St. 159, 161.

⁵ Kimball v. Fisk, 39 N. H. 110, 116.

⁶ Cleveland v. Hopkins, 2 Aik. 394, 399.

⁷ Ante, § 118.

⁸ Jessup v. Jessup, 7 Ind. App. 573, 577.

⁹ Royston's Appeal, 53 Wis. 612, 625.

¹⁰ Cuneo v. Bessoni, 63 Ind. 524.

¹¹ Gibson v. Jeyes, 6 Ves. 266, 273; Ridgway v. Darwin, 8 Ves. 65; *Ex parte Cranmer*, 12 Ves. 445, 454 (Lord Erskine, in this case, directing an inquisition under a writ, not issuing in lunacy, which he styled a "*Melius Inquirendum*").

¹² Rap. & Lawrence L. D. "Commission of Lunacy."

Twelve jurors
must concur in
verdict.

ber of jurors is not limited to twelve; but twelve must concur in the verdict; and the concurrence of twelve out of a greater number is sufficient, though the others refuse to join.¹ It is irregular, however, to continue the proceeding before a part only of a greater number before whom it was begun.²

Jurors summoned must be
indifferent in
the matter.

he thinks proper, who are indifferent in relation to the matter. The commissioners may pass on the validity of challenges to jurors so selected; but it is irregular and improper for them to dictate to the sheriff what jurors should be summoned, and for doing so the proceedings will be set aside and a new commission ordered.³ They have power to summon witnesses and compel their attendance;⁴ and the refusal to do so was held fatal to the proceeding.⁵ They may examine

Commissioners
pass on chal-
lenges of
jurors, but
must not select
who is to be
summoned.

the alleged lunatic or *non compos* personally, and compel his production before them;⁶ but it is not compulsory upon them to make such examination.⁷ The party himself has a right to be present,⁸ and to testify.⁹

The commission should have a return day named therein, so as to limit the time within which it should be executed.¹⁰ Lord Hard-

Commission
should name a
return day.

wicke called attention to the improper use to which a commission of lunacy kept by a person without being executed might be put in many respects, particularly to terrify and distress the person against whom it issues; and held such course a contempt of court.¹¹

It seems evident, that, since the burden of proof is with the relator, he must open and close the examination before the jury.¹²

¹ *Ex parte Wragg*, 5 Vesey, 450. In this case the jury consisted of seventeen, of whom twelve joined in the verdict, the other five refusing. See also *Matter of Arnhout*, 1 Paige, 497, 499; *Lindsley's Case*, 46 N. J. Eq. 358, 361.

² *Tebout's Case*, 9 Abb. Pr. 211.

³ *Matter of Wager*, 6 Paige, 11.

⁴ Per Lord Eldon in *Lund*, *ex parte*, 6 Ves. 781, 784.

⁵ *Plank's Case*, 5 Clark, L. J. Rep. 35.

⁶ *Ex parte Southcot*, 2 Ves. Sen. 401, 405; *Lord Wenman's Case*, 1 P. Wms. 701.

⁷ *In re Lincoln*, 1 Brewst. 392, 393;

Matter of O'Brien, 1 Ashm. 82; *De Hart v. Condit*, 51 N. J. Eq. 611, holding that the fact that only part of the jurors viewed the alleged lunatic is no ground to set aside the inquisition; *Child*, *in re*, 16 N. J. Eq. 498.

⁸ See *ante*, § 121.

⁹ *Matter of Dickie*, 7 Abb. N. C. 417.

¹⁰ *Plank's Case*, 5 Clark, L. J. Rep. 35; *Lincoln*, *in re*, 1 Brewst. 392.

¹¹ *Anonymous*, 2 Atk. 52.

¹² *Commonwealth v. Haskell*, 2 Brewst. 491, 495: "The party alleging the insanity of himself or of another is bound to prove his averment," says Brewster, J.,

It was held in New York that the presence of the sheriff in the room with the jury, or conversation by him with them, in relation to the subject which they had under consideration, is such an impropriety and irregularity as to require the inquisition and commission to be set aside, and a new commission to be ordered, the warrant to be served by the coroner.¹ Chancellor Walworth gave it as his opinion, that after the testimony is closed, the commissioners should instruct the jury as to the question before them, stating the law applicable to the case, recapitulating the facts, if necessary, but without argument of counsel on either side; and that they are to be instructed to deliver their verdict, if any twelve of them agree, and if not, then to report such fact.²

Relator opens and closes before the jury.

Sheriff should not be present with jury in their retirement.

Commissioners instruct the jury.

Legal questions arising in the execution of the commission must be decided by the commissioners, or a majority of them.³

In Georgia, the statute requiring the commission to be directed to eighteen, one of whom a physician,⁴ any twelve of whom are competent to execute it, is complied with if thirteen report.⁵ In Mississippi, the jurisdiction of chancery courts over lunatics is exercised by the clerk (subject to approval by the court), who, on proper application, directs the sheriff to summon the alleged lunatic and also six householders to make inquiry of the alleged lunacy, and return the result of the inquisition to the clerk.⁶ The jury are to determine whether the respondent, if found *non compos*, is to be sent to the asylum, jail, or poorhouse; and their verdict may be rendered by a

Jury of eighteen in Georgia, thirteen of whom report.

Jury of six in Mississippi

determine whether lunatic to be sent to asylum, etc.

in his instruction to the jury. It is to be observed, however, that this ruling was made on a traverse, and not on the original inquisition; and that it overruled a previous decision holding the contrary to be the rule on traverse: *Commonwealth v. Desilver*, 2 Ashm. 163. See, on the subject of traverse, *post*, § 127.

¹ *Matter of Arnhout*, 1 Paige, 497, 498.

² *Matter of Arnhout*, *supra*. If by the phrase, "without argument of counsel on either side," the Chancellor meant to inhibit counsel from addressing the jury at all, the propriety of such ruling is not clear. "For it might become a very essential part of his duty to enlighten the jury

upon the value or significance of the evidence introduced," says Ordonaux in his commentary on the Lunacy Laws of New York. It is quite possible, however, that the Chancellor meant only to cut off argument on his charge to the jury.

³ Per Chancellor Walworth, in *Matter of Arnhout*, 1 Paige, 497, 499.

⁴ Code, 1882, § 1855.

⁵ *Field v. Lucas*, 21 Ga. 447, 451. "This is not one of the cases," says Lumpkin, J., "where the cabalistic number twelve, in imitation of the twelve signs of the Zodiac; twelve months of the year; twelve Patriarchs, twelve Apostles, etc., must be strictly observed."

⁶ Ann. Code, 1892, § 2835.

majority. The Chancery Court may also appoint a guardian to any one adjudged to be of unsound mind, of its own motion, or on the application of a friend or relative, or of a member of the board of supervisors; or if not so adjudged, the court or clerk may issue a writ *de lunatico inquirendo*.¹ In New York, one of the commissioners should always be a counsellor or solicitor of the Court of Chancery, and in cases of importance the commission ought not to be executed without his presence.² In Pennsylvania, the commission may consist of one or more, and they issue a *venire* for not less than six nor more than twelve jurors;³ if five of six jurors sign a report finding a person a lunatic, and the sixth juror refuses to concur in such report, such report amounts to a return that the jury cannot agree, and an *alias* commission may be ordered on the original application.⁴ In Tennessee, the County Court (having jurisdiction where the estate does not exceed \$500), as well as the Court of Chancery (if the estate exceeds \$500 in value); issue *venire* for twelve jurors, to inquire and ascertain by their verdict whether the defendant be an idiot, a lunatic, or a person of unsound mind.⁵

§ 123. Procedure in Courts of Probate respecting Persons of Unsound Mind. — Statutory proceedings to have a person of unsound mind placed under guardianship in the United States differ somewhat from the procedure in chancery under writs of idiocy or lunacy; notably in requiring a regular trial before the court, instead of examination before a commission.⁶ But in Tennessee, where the jurisdiction is concurrent between chancery and county courts,⁷ the testimony in cases of inquisition is not delivered in court, but is heard only by the jury; hence, it is there decided that the inquisition in the county courts must conform as near as may be to the rules and regulations laid down for the conduct of such cases in the chancery courts.⁸ In Alabama, it is held that although there be no direct requirement in the statute to that

Court may appoint guardian *sua sponte*.

Not less than six nor more than twelve jurors in Pennsylvania.

Twelve jurors in Tennessee.

Regular trial in probate courts.

In Tennessee to conform to proceeding in chancery.

¹ Code, 1892, § 2212.

² Matter of Root, 8 Paige, 625, 627.

³ Bright. Purd. Dig. 1885, p. 1126, §§ 6, 8.

⁴ Marple's Case, 15 Pa. Co. C. 310.

⁵ Code, 1884, §§ 4431, 4433.

⁶ Thus it is provided by statute in Iowa,

that the procedure constitutes an ordinary action, in which the applicant is plaintiff, and the respondent defendant: McClain's Ann. Code, 1888, § 3464.

⁷ If the estate exceeds \$500 in value.

⁸ Davis v. Norvell, 3 Pickle, 36; Al-
bright v. Rader, 13 Lea, 574.

effect, yet it evidently contemplates the trial before the judge of probate, who must preside, administer the oath to the jury, and receive their verdict; and that a trial before the sheriff, in the absence of the probate judge, is void.¹

Trial by sheriff
in absence of
court, void.

The trial is in most instances before a jury, as is provided by statute in direct terms in a number of States. In Arkansas, the statute directs that the court shall cause the party to be brought before it, "and inquire into the facts by a jury."

Trial before a
jury.

*if the facts be doubtful.*² In Arizona, nothing is said in the statute about a jury in connection with the proceedings for the appointment of a guardian to a person incapable of taking care of himself and managing his estate; but if, on full hearing, *it appears to the judge*, that the

Except in some
States or terri-
tories.

person is incompetent as alleged, it is his duty to make the appointment.³ It is also provided in this territory (as in many States), that before a person can be committed to an insane asylum the probate judge shall cause the person alleged to be insane and dangerous to be brought before him, and also witnesses who are acquainted with him; also one or more graduates of medicine and reputable practitioners; and on the report of these the judge decides whether he is to be confined or not,⁴ and on ascertaining that such person is possessed of sufficient property, appoint a guardian without further proceeding.⁵ A similar statute in Minnesota⁶ was held unconstitutional, on the ground that it authorized the commitment of persons to forcible confinement without due process of law.⁷

Judgment
without trial
held unconsti-
tutional.

A jury of six is mentioned in some States;⁸ in others a jury, but not the number of jurors, is spoken of,—in which case it is to be presumed that a jury at common law (consisting of twelve members) is intended;⁹ while in many others still the number of the jurors is fixed by the statute at twelve. It has already been mentioned, in connection with commissions of lunacy in chancery, that the number of jurors there is not

Jury of six,
of twelve.

¹ Laughinghouse v. Laughinghouse, 38 Ala. 257.

² Dig. 1894, § 3815.

³ Rev. St. 1887, § 1338.

⁴ Ib., § 2156.

⁵ Ib., § 2158.

⁶ Gen. L. 1893, ch. 5.

⁷ State v. Billings, 55 Minn. 467, 474.

⁸ For instance, in Colorado: Mills' Ann. St. 1891; Illinois: Rev. St. 1889, ch. 85, § 4; Kansas: St. 1889, § 3681 (in connection with proceedings to commit an insane person).

⁹ Henning v. Hannibal, 35 Mo. 408, citing earlier Missouri cases; State v. Kansas City Co., 45 Mo. App. 551, 564.

limited to twelve, but consists, usually, of not less than twelve, nor more than twenty-three,¹ of which, however, twelve must unite on the verdict. At law, or in proceedings in probate courts, the panel should consist of a number sufficiently large to enable the peremptory challenges, as allowed by law, to be exhausted, and leave the number required for the jury. But the fact that a smaller number have been summoned, if not objected to before the jury is sworn, is no ground to disturb a verdict after it is rendered.² A statute providing for the summoning of but twelve jurors was held constitutional.³ In Alabama, bystanders may be called on by the sheriff to serve on the jury in place of those who fail to attend, or are excused.⁴ Where the statute requires a trial by jury, it seems obvious that a finding of lunacy by the judge, without the intervention of a jury, is void.⁵

Where no objection is made to a juror after it appears that he had served as a juror on a former inquisition as to the lunacy of the same party, the objection is waived, if the party proceed, under advice of his counsel, and permit the trial to be concluded and the verdict to be rendered.⁶

In Mississippi, the verdict does not require the concurrence of all the jurors; it is valid if rendered by a majority;⁷ and in Ohio probate judges were authorized, by Act of April 7, 1856, to appoint guardians to deaf and dumb persons of full age, who are found by the court to be incapable of managing their affairs, without submitting the question to a jury of any kind.⁸

The death of a person pending proceedings to have him adjudged a lunatic, before inquisition found, puts an end to the proceedings, and there can be no inquisition taken thereafter, and no decree made by the court on the merits of the case.⁹

§ 124. **Evidence to establish Unsoundness of Mind.** — The essential question in trials of this kind being, whether the respondent's

¹ *Ante*, § 122.

² *De Hart v. Condit*, 51 N. J. Eq. 611; 362. *Lindsley's Case*, 46 N. J. Eq. 358, 361.

³ *De Hart v. Condit*, *supra*.

⁴ Code, 1886, §§ 2393, 2394.

⁵ *Kiehne v. Wessel*, 53 Mo. App. 667, 669.

⁶ *Lindsley's Case*, 46 N. J. Eq. 358, 362.

⁷ Ann. C. 1892, § 2836.

⁸ Dictum by Scott, C. J., in *Shroyer v. Richmond*, 16 Oh. St. 455, 464.

⁹ *Bartholomew's Appeal*, 134 Pa. St. 227, 232.

mind is so unsound as to incapacitate him from governing himself, or managing his property,¹ the burden of proof is on the applicant or relator. There is some difference, in this respect, from the rule prevailing in many States on the probate of wills, where the familiar presumption of sanity is held insufficient to establish the testator's undenied sanity, in executing the will, which must be proved by affirmative testimony;² and differing, also, from the rule applied in criminal cases,³ and in cases where the defendant seeks to avoid his act on the ground of unsoundness of mind, in which the burden of proof is on the defendant.⁴ But the gravamen of the question, the main fact to be proved in all of these cases, is the same; hence, the same kind of proof is, with slight, if any, exception, competent to establish the party's unsoundness of mind.

Burden of proof is on relator.

In actions for the interdiction of a party, or proceedings for the appointment of a guardian to take charge of the person or estate of a person of unsound mind, investigation of the motives of those who are provoking the interdiction, or carrying the commission in lunacy, is of the utmost consequence. The court will guard with peculiar care the alleged lunatic from interference springing from a hostile motive, and will weigh with more precision the evidence, if the person by whom it is tendered appears to be actuated by a sinister intent.⁵

Motives of those who are active in prosecuting the trial are of utmost importance.

The nature of the fact to be proved in such proceedings compels resort to the opinions of witnesses, although they may be neither professionals nor experts.⁶ The rule which allows such opinions, is a rule of necessity;⁷ if it is

Opinions of non-experts admissible;

¹ See *ante*, § 114, as to the statutory provisions on the subject of inquisitions of lunacy.

² See Woerner on Adm. § 26; also § 220.

³ Wharton's Cr. L. § 61.

⁴ *Chicago W. D. R. R. v. Mills*, 91 Ill. 39, 43.

⁵ *Francke v. His Wife*, 29 La. An. 302, 303.

⁶ The reasons demanding the competency of such testimony are lucidly stated by Doe, J., dissenting in the case of *Boardman v. Woodman*, 47 N. H. 120, 144, and authorities cited in support of his view;

the opinion of the majority was subsequently overruled in *Hardy v. Merrill*, 56 N. H. 227, 234 *et seq.*, and the doctrine, as announced above, established in New Hampshire.

⁷ It "rests upon the proposition that there may be something about the looks, deportment, etc., of a person which may contribute to the conclusion that he is of unsound mind, which cannot be described by the witness:" *Cline v. Lindsey*, 110 Ind. 337, 341. If all the facts can be presented to the jury, then no opinion can be given by the witness: *Carthage F. P. Co. v. Andrews*, 102 Ind. 138, 142.

excluded, says Wharton, in his treatise on Medical Jurisprudence,¹ no other can be found to take its place. Foster, C. J., of the Supreme Court of New Hampshire, in reviewing the authorities on the subject, and overruling the earlier New Hampshire cases, suggests as a safe formula for a general rule the following: "Opinions of witnesses derived from observation are admissible in evidence, when, from the nature of the subject under consideration, no better evidence can be obtained."² But the

but only in
connection
with the facts
on which the
opinion is
based.

rule is generally enforced which requires of the witnesses whose opinion is allowed to be given to the jury, to state, also, the facts upon which they base their opinion;³ though in Indiana, a witness was allowed, in a criminal case, to give his opinion on the question of insanity without stating other facts, after testifying that he had known and frequently seen the party whose sanity was in question during a period of two years.⁴

It is obvious, however, that the opinions of even medical experts, though worthy of the most careful consideration, and respectful attention, and to be weighed with other testimony in reaching a conclusion, cannot and ought not solely to control the court or jury in the opinion they are to pronounce on the facts before them.⁵ The capability of the party under examination to manage his estate is a question for the jury, and opinion evidence to that effect would invade the province of the jury, and cannot, therefore, be admitted.⁶

Isolated instances of making one or more improvident bargains, or the fact that he is generally unthrifty or unsuccessful in his business, though not *per se* proof that the party is

¹ 1 Whart. & St. Med. J. § 257.

² Hardy v. Merrill, 56 N. H. 227, 241.

³ *In re Carmichael*, 36 Ala. 514, 522; *Garrison v. Blanton*, 48 Tex. 299, 303; *Gray v. Obear*, 59 Ga. 675, 682; *Jones v. Perkins*, 5 B. Mon. 222, 223. Wharton, after citing numerous cases to this point, says (Whart. Law of Ev. § 451): "But this distinction amounts to nothing, since experts, no matter how skilful, may be required to give the facts on which their opinion rests; and since there is no statement of fact, even by non-experts, that

does not amount to an opinion. The true distinction, therefore, is this, that the non-experts can only speak from observation, while the experts can also speak from hypothetical cases."

⁴ *Sage v. State*, 91 Ind. 141.

⁵ Per Manning, C. J., delivering the opinion of the court in *Francke v. His Wife*, 29 La. An. 302, 305. See also opinion of De Blanc, J., on rehearing: p. 313, 314.

⁶ *Hamrick v. Hamrick*, 134 Ind. 324, 327.

non compos mentis, are admissible in connection with facts and circumstances tending to show mental unsoundness.¹ The acts and conduct of a party from his boyhood up are admissible to illustrate his condition of mind at the time of the trial;² and so, of course, his sayings, and manner of talk and conversation, as furnishing the best evidence of his mental condition; but statements made by others are clearly incompetent,³ though given in the shape of family or neighborhood reputation, or as public opinion.⁴ Old age alone, if the party possess good rational powers, though under the influence of profligate children and induced by them to spend his property for their indulgence in intemperate practices, is not sufficient proof that such person is *non compos mentis*, but may justify the appointment of a guardian over him as a spendthrift.⁵ So the fact that a person is in the hundredth year of her age, her sight very much, her hearing somewhat, impaired, and her mental faculties somewhat weakened, so that she may be easily imposed upon in a manner that would justify the setting aside any instruments or transactions executed under the effect of such influence, does not amount to unsoundness, such as to take from her the control of herself and her property.⁶

Improvident bargains or unthriftiness in business may be shown.

Acts from boyhood up are admissible.

Statements of others are incompetent.

Old age may be shown.

But age, impairment of sight and hearing, weakening of intellect, not alone sufficient to warrant appointment of guardian.

Irritability of temper and excitability of disposition do not constitute insanity, nor are they of themselves evidence of insanity;⁷ but sudden irritability, moroseness, and indulgence in the use of profane language, without apparent cause or provocation, indicating a radical change of disposition, may be shown, in connection with other facts, as tending to prove mental derangement.⁸ So of depravity of character and

Irritability or excitability is not insanity,

¹ *In re Carmichael*, 36 Ala. 514, 522; *Hamilton v. Hamilton*, 10 R. I. 538, 541; *Henry v. Fine*, 23 Ark. 417, 420.

² *Gray v. Obear*, 59 Ga. 675, 681.

³ *Gray v. Obear*, *supra*; *In re Dey*, 9 N. J. Eq. 181, 184. It may be mentioned here that it is held to be a well-settled rule, that evidence of a person's insanity at the time of trial is competent as tending to show the condition of his mind at a previous period: *Berry v. Hall*, 105 N. C. 154, 162, and *vice versa*, *People v. Farrell*, 31 Cal. 576, 581; *Freemen v. People*, 4 Denio, 9, 40.

⁴ *Foster v. Brooks*, 6 Ga. 287, 291; *Choice v. State*, 31 Ga. 424, 470.

⁵ *Darling v. Bennet*, 8 Mass. 129.

⁶ *Matter of Collins*, 18 N. J. Eq. 253, 255; *Matter of Vanauken*, 10 N. J. Eq. 186, 194. To similar effect: *English v. Porter*, 109 Ill. 285, 291, citing Illinois cases.

⁷ *Willis v. People*, 32 N. Y. 715, 718.

⁸ *Conely v. McDonald*, 40 Mich. 150, 159; *Bitner v. Bitner*, 65 Pa. St. 347, 361; to similar effect: *Barbo v. Rider*, 67 Wis. 598, 600.

but admissible, as also moroseness, causeless profanity, depravity, abandoned habits, to prove mental derangement.

abandoned habits; though in connection with a weak mind and blunted moral perceptions, they are not in themselves evidence of insanity,¹ yet evidence that one who had been mild, amiable, and modest, had become irritable, harsh, suspicious, and obscene is proper on a question of mental capacity.²

Matters of mere belief, whether religious, moral, or political, how absurd soever they may appear to others, do not constitute insane delusions. Neither superstition nor ignorance, however gross;³ no belief as to the nature or existence of rewards and punishments in a future state,⁴ can be regarded as tests of insanity.⁵

Belief, however absurd, superstition, or gross ignorance are no tests of insanity.

Moral perversion, depravity, debasement, not amounting to destitution of reason, is not in itself necessarily insanity.⁶ But evidence that a woman had lived for four years with a man who had abandoned his own wife and family, and had become the mother of two illegitimate children, was admitted in Connecticut as showing "debauched habits" and depraved morals calculated to produce mental imbecility.⁷ To excuse a criminal act on the ground of insanity of the doer, the insanity must be such as amounts to a mental disease preventing the accused from knowing the nature and quality of the act he does, the law recognizing no moral power as compelling one to do what he knows to be wrong.⁸

Moral perversion, debasement, not amounting to deprivation of reason, is not insanity, but may be admitted as showing debauched habits and depraved morals producing imbecility.

Ancient presumption that one born deaf, dumb, and blind is an idiot

There was anciently a presumption, that one who was born deaf, dumb, and blind is in the same state with an idiot, being supposed incapable of any understanding, as wanting all those senses which furnish the

¹ Hill v. Hill, 27 N. J. Eq. 214, 216.

² Bitner v. Bitner, *supra*.

³ See Woerner on Adm. § 25, for a list of cases holding that a belief in spiritualism is not of itself a certain test of insanity, note (4) on p. 34; the testator's belief in clairvoyance does not invalidate his will, unless it be the offspring of such belief; and so of the belief in the exercise of unnatural powers by others. To same effect: Brown v. Ward, 53 Md. 376, 393.

⁴ Gass v. Gass, 3 Humph. 278, 282.

⁵ "Since there is no test by which the

truth of such a belief can be ascertained:" Busw. on Ins. § 210.

⁶ Mullins v. Cottrell, 41 Miss. 291. "It is a lamentable fact that the grossest immorality and considerable intelligence are found together:" Mayo v. Jones, 78 N. C. 402, 406.

⁷ Wickwire's Appeal, 30 Conn. 86.

⁸ State v. Brandon, 8 Jones L. 463, 467. See also Choice v. State, 31 Ga. 424, 472, affirmed in Humphreys v. State, 45 Ga. 190; Boswell v. State, 63 Ala. 307, 316; Flanagan v. People, 52 N. Y. 467; State v. Spencer, 21 N. J. L. 196, 207.

human mind with ideas.¹ But if such presumption ever existed against one who was born deaf and dumb, it yields to proof of the contrary.² It is now held that no one is to be deemed an idiot from the mere circumstance of being born deaf and dumb;³ but if incapable of understanding any matters of business, it is obvious that a verdict cannot be sustained which holds her to be of sound mind and capable of managing her property through an agent.⁴

If unsoundness of mind, or inability to manage himself or his property, is predicated of a habitual drunkard, as being caused by the indulgence in his vice, it is not sufficient that occasional acts of drunkenness are proved; a fixed habit of drunkenness must be shown. But it is not necessary to show that he be continually in an intoxicated state; a man may be a habitual drunkard, and yet be sober for days and weeks together.⁵ It is also held that if the jury find the party to be, at the time of the inquisition, a habitual drunkard, it was unnecessary to decide whether he was capable or incapable of managing his estate. His incapacity in that event is a presumption of law,—if not conclusive, at least throwing the burden of proof of capacity on the party asserting it.⁶

yields to proof of the contrary.

Occasional acts of drunkenness do not constitute one a habitual drunkard.

A habitual drunkard is presumed incapable of managing his affairs.

To authorize the appointment of a guardian over a person as a spendthrift, it is not enough to show foolish or weak-minded habits in the management of money; there must be proof to show that the party is a spendthrift in the statutory sense, namely, by reason of excessive drinking, gaming, idleness, debauchery, or vicious habits of any

Foolish or weak-minded management of money does not make one a spendthrift.

¹ 1 Bla. 304. Coke (Co. Litt. 42 b) distinguishes between persons born deaf, dumb, or blind, so that they have understanding and sound memory, albeit they express their intentions by signs, who are competent to enfeoff, and those deaf, dumb, and blind from nativity, whose feoffments may be avoided.

² So Lord Hardwicke decreed an estate to one born deaf and dumb, upon his answering properly questions put to him in writing: *Dickenson v. Blisset*, 1 Dick. 268. "By the civil law," says Chancellor Kent, in *Brower v. Fisher*, 4 Johns. Ch. 441, 444, "it was generally understood and laid down, that a person born deaf and dumb was incapable of making a will, and

deemed a fit subject for a curator or guardian."

³ *Brower v. Fisher*, 4 Johns. Ch. 441, 443; *Christmas v. Mitchell*, 3 Ired. Eq. 535, 541; *Perrine's Case*, 41 N. J. Eq. 409, 410.

⁴ *Perrine's Case*, *supra*.

⁵ *Ludwick v. Commonwealth*, 18 Pa. St. 172, 174. "We agree," says Rogers, J., in pronouncing the opinion in this case, "that a man who is intoxicated or drunk one-half his time is a habitual drunkard:" p. 175. *Matter of Hoyt*, 20 Abb. N. C. 162, 164.

⁶ *Ludwick v. Commonwealth*, *supra*; *McGinnis v. Commonwealth*, 74 Pa. St. 245, 249; *Matter of Tracy*, 1 Paige, 580, 582.

kind.¹ And so mere weakness of mind of the party alleged to be insane will not justify a decree of interdiction, when, in view of all the evidence, such a decree is not necessary for the protection of the party's property, or person, or of society.²

§ 125. **Inquisition³ or Finding of the Jury.** — Technical precision in the language of the inquisition or return of the commission, or the verdict of the jury, is not in modern practice of so much importance, particularly under modern statutes of the several States, either in chancery or courts of probate jurisdiction, as it was under the common law writs *de idiota* and *de lunatico inquirendo* issued out of chancery, as late as Lord Hardwicke's time. Although distinctions among the several forms of unsoundness of mind are still recognized,⁴ yet, in so far as the purpose of the inquisition is to give jurisdiction to a court of chancery or of probate for the appointment of a guardian, or trustee under whatever name,⁵ to protect the person or property of one mentally incapable to do so himself,⁶ the gravamen is seen to lie in such incompetency, from whatever cause it may have arisen; and since it is the office of the inquisition to establish or negative this fact, any verdict or finding showing its existence or non-existence should be sufficient.⁷ Thus the insertion of the superfluous finding: "and does enjoy lucid intervals," coupled with the further finding that the party "is a lunatic and of unsound mind," "so that

Technical precision is of less importance in the return of the jury than it was anciently.

But must show mental incompetency to manage his affairs.

Surplusage in the verdict may be disregarded.

¹ Morey's Appeal, 57 N. H. 54.

² Francke v. His Wife, 29 La. An. 302; Interdiction of Watson, 31 La. An. 757, 759.

³ The term "inquisition" is used to denote the instrument in writing on which the decision or finding of the commission or jury is made, as well as the proceeding, or examination of facts, in relation to the mental condition of a person alleged to be of unsound mind. The sheriff or coroner, and the jury who make the inquisition, are called the inquest: Bouv. L. D., "Inquisition."

⁴ Ante, §§ 113, 114.

⁵ Guardians of persons of unsound mind are variously known as conservators, committees, trustees, overseers.

In Georgia it was decided that a "com-

missioner" over a lunatic is not known to the law of that State: Ross v. Edwards, 52 Ga. 24, 27.

⁶ Whether such incapability arose from idiocy, lunacy, distraction, or any other form of madness, or from habitual drunkenness, opium or morphine eating, excessive debauchery, or such profligacy as constitutes him a spendthrift, or from any of the causes mentioned in the statute.

⁷ Commonwealth v. Schneider, 59 Pa. St. 328, 330, approving McElroy's Case, 6 Watts & S. 451, 457, and criticising Beaumont's Case, 1 Whart. 52; Matter of Mason, 1 Barb. 436, 439; Matter of Rogers, 9 Abb. N. C. 141, 144; Smith v. Burnham, 1 Aik. 84, 93; Matter of James, 35 N. J. Eq. 58; Kiehne v. Wessell, 53 Mo. App. 667, 669.

he is not capable of the government of himself, his lands, tenements, goods, and chattels," was held not to vitiate the verdict, which was sufficient, because it shows that notwithstanding the lucid intervals he is not capable of governing himself or his estate.¹ And although the words of an inquisition finding the party to be "lunatic and idiotic," are not responsive to the language of the statute, and may be rejected as superfluous and redundant, yet the technical and precise finding that she is of an "insane mind" is enough to support the inquisition.² So it was held, that the recommendation of a jury in its verdict of sanity, that the alleged lunatic, from long confinement and its consequences, may require some temporary guardianship, is proper, and does not impair the legal effect of the verdict.³

But the inquest or verdict should find the individual proceeded against to be of unsound mind, or to come under some one of the classes of those mentioned in the statute as being liable to be put under guardianship, *and* incapable of governing himself or of managing his property.⁴ In England the Lunacy Regulation Act, 1862,⁵ prescribes the issue or question to be, under every order for inquiry, or commission of lunacy, whether or not the person who is the subject of the inquiry is, at the time of such inquiry, of unsound mind, and incapable of managing himself or his affairs. It is plain, that under this statute there must be a finding that the subject of the inquiry is both of unsound mind *and* incapable of managing himself or his affairs. The statutes of many of the American States contain substantially similar provisions, and therefore require the same kind of finding or verdict, before the court has jurisdiction to appoint a guardian, conservator, or committee.⁶

Verdict must show that party is one of the class of persons mentioned in the statute and unable to govern himself or his estate.

¹ Matter of Hill, 31 N. J. Eq. 203. "The practice of inserting in the return a finding on the subject of lucid intervals is derived from the ancient practice under the writ *de lunatico inquirendo*, which was applicable only to those who were adjudged to be lunatics according to the significance of the term as it was then understood. Anciently, only those persons who enjoyed lucid intervals were regarded as lunatics; the mental disorder being thought to be dependent on the moon, and therefore intermittent:" p. 204.

² *Bethea v. McLennon*, 1 Ired. L. 523, 526 (the further words, "she is incapable of managing her affairs," are also held in this case to be surplusage).

³ Matter of Dickie, 7 Abb. N. C. 417.

⁴ Matter of Morgan, 7 Paige, 236; *Beaumont's Case*, 1 Whart. 52; *Fentress v. Fentress* (*arguendo*), 7 Heisk. 428, 433; *Matter of Conover*, 28 N. J. Eq. 330; *Re Lindsley*, 43 N. J. Eq. 9; *Commonwealth v. Reeves*, 140 Pa. St. 258.

⁵ 25 & 26 Vict. ch. 86. § 3.

⁶ "An inquisition should, therefore, be

In Minnesota, the statute provides, that the finding of the jury must be "sane" or "insane."¹ In Kentucky, the statute requires an oath to be administered to the jury to ascertain, "by the verdict," *i. a.*, for what reason the incompetency exists;² and the omission to specify such reason in the verdict and the judgment thereon is held fatally defective.³

In Iowa, the statute provides for the appointment of a guardian of "an idiot, lunatic, or person of unsound mind," and it is held

In Iowa. that the latter class differs from either of the others;

and that if the evidence disclose incapability of exercising judgment, reason, and deliberation, — of weighing the consequences of his acts and their effects, to a reasonable degree, upon his property, family, and attendants, the jury should find such person to be of unsound mind.⁴ But it is held, in this State, that if the record in a proceeding to determine the sanity of a defendant shows the appointment of a guardian *ad litem* pending the proceeding, and a final order appointing one as guardian of the person alleged to be of unsound mind, it will be presumed that the fact of mental unsoundness was established, though the record be silent on that question.⁵ In New Hamp-

In New Hampshire. shire, where the statute requires the judge of probate, on a proper request made to him, to direct the selectmen to make inquiry into the state of mind of an alleged idiot, *non compos*, lunatic, or distracted person, a return by the selectmen that "the memory" of the person to whom the inquiry related, "is greatly impaired," is not sufficient to support the appointment of a guardian.⁶

§ 126. Setting aside the Finding and Granting New Trial —

Misbehavior in Misbehavior in executing the commission. Misbehavior in the execution of a commission is a good ground for quashing it and ordering a new commission;⁷ such as, for instance, in hurrying the proceedings and refusing to allow sufficient time for procuring wit-

regarded as a nullity, which barely found that the party was of such weakness of mind as to be incapable of managing his affairs," without finding him a lunatic, or using some equivalent expression, as "of unsound mind," or the like: Taylor, Ch. J., in *Armstrong v. Short*, 1 Hawks, 11, 13.

¹ St. 1891, § 5891.

² St. Ky. 1894, § 2155.

³ *Menefee v. Ends*, 30 S. W. (Ky.) 881.

⁴ *Smith v. Hickenbottom*, 57 Iowa, 733, 738.

⁵ *Guthrie v. Guthrie*, 84 Iowa, 372, 376; *Ockendon v. Barnes*, 43 Iowa, 615, 616.

⁶ *H— v. S—*, 4 N. H. 60, 65.

⁷ *Glen, ex parte*, 4 Desaus. 546.

nesses;¹ or where there is no doubt that the jury must have erred in its finding,² or where they failed to sign the inquisition.³ So the party against whom a commission *de lunatico inquirendo* has been executed is entitled to a new trial of the writ if it appear that the finding against him was induced by any bias or previously formed opinion.⁴ A chancery court can and will order a second inquisition in lunacy when the first is irregular or unsatisfactory from the finding being against evidence, or by a mistake of the jury as to their duty; or if, at some time after the first, it appears that there is an evident change in the condition of the subject.⁵ In New York a county judge set aside the verdict of a jury on a traverse, although the finding was the same as on the original inquest, on the ground that the judge, having carefully examined the evidence and also the party in question personally, was satisfied beyond doubt of his sanity.⁶

or error in the finding entitles the party to a new trial.

A court of chancery will order new inquisition, if finding be irregular, or unsatisfactory.

While there is no doubt of the power of a court of chancery to quash an inquisition or set aside a verdict for irregularity, or misbehavior of the jury, or for any of the causes authorizing courts to set aside the verdict of a jury, courts of probate seem to have no such authority, unless expressly granted by statute. Thus authority is given to set aside the inquisition during the term, and for the summoning of a new jury; but if two juries have agreed to the same finding, the inquisition shall not be set aside, for instance in Arkansas,⁷ Kansas,⁸ Missouri,⁹ New York,¹⁰ and Wyoming.¹¹ In

Probate courts have such power only by statutory grant.

¹ *Matter of Jewell*, 26 N. J. Eq. 298; *Glen, ex parte, supra* (but a new trial was refused in this case because it appeared to the court that substantial justice had been done).

² *Matter of Lasher*, 2 Barb. Ch. 97, 98.

³ *Matter of Mason*, 51 Hun, 138, 141.

⁴ *Tebout's Case*, 9 Abb. Pr. 211.

⁵ *Matter of Collins*, 18 N. J. Eq. 253, 254; *Matter of Lawrence*, 28 N. J. Eq. 331. The return of an inquisition in lunacy was set aside by the Chancellor after a personal examination in the *Matter of Fitzgerald*, 30 N. J. Eq. 59; *Matter of Lasher*, 2 Barb. Ch. 97; *Hovey v. Harmon*, 49 Me. 269, 271.

⁶ *Matter of Shaul*, 40 How. Pr. 204.

⁷ Dig. 1894, § 3820.

⁸ Gen. St. 1889, § 3684.

⁹ Rev. St. 1889, § 5520. It is held in this State, that the Probate Court may set aside its judgment adjudging a person insane and appointing a guardian for him, even at a subsequent term, on the ground of irregularity in the proceeding; and failure to show by the record service of notice, or reason why notice was not served, is sufficient ground: *Matter of Marquis*, 85 Mo. 615.

¹⁰ *Matter of Mason*, 20 N. Y. St. Rep. 602, holding that the County Court has power to set aside an inquisition, and to grant a new trial, before a jury; *Jackson v. Jackson*, 37 Hun, 306, 309.

¹¹ Rev. St. 1887, § 2294.

Tennessee, either party may move to set aside the inquisition at the first term after the proceeding was had;¹ and in Texas the court may grant a new trial within ten days.² In Wisconsin the proceedings for the appointment of a guardian to an insane or mentally incompetent person are held to be equitable in their nature, and the verdict of a jury merely advisory to the Chancellor therein;³ and so in Illinois, if a feigned issue is sent out of chancery to a jury for trial, the Chancellor may regard or disregard it, and enter a decree contrary to the finding, as, in his judgment, the weight of evidence may justify.⁴ In Pennsylvania the Court of Common Pleas has no power to set aside an inquisition of lunacy finding the fact of lunacy, on the ground of insufficiency of the evidence.⁵ It is held in Michigan, that after a delay of six years one adjudged incompetent has no right to invoke the writ of mandamus to compel a probate court to hear his petition to set aside the order so adjudging him, as void for jurisdictional defects appearing on the face of the petition;⁶ and so in Pennsylvania an inquisition will not be quashed because of a previous outstanding and unreturned commission, issued five years before, on which the commission had never acted, and proceedings on which all parties had treated as abandoned.⁷

The fact that only a part of the jurors visited the alleged lunatic for personal examination of him, is not sufficient ground to set aside inquisition.⁸

§ 127. **Traverse of the Inquisition.** — The right to traverse the finding or inquisition in a lunacy proceeding grew out of the *ex parte* nature of the proceeding before the passage of the English Lunacy Regulation Acts.⁹ Since under the English law the crown has not the power to take upon itself the care of any individuals,

¹ Code, 1884, § 4452. The Chancellor may examine the evidence (which in this State is required to be reduced to writing: § 4447 of the Code), and also other affidavits, and may grant or refuse a new trial: § 4453; or order a new inquest, or decree on the facts: § 4454.

² Sayles' Tex. Civ. St. 1888, § 2659.

³ Barbo v. Rider, 67 Wis. 598, 607.

⁴ Titcomb v. Vantyle, 84 Ill. 371, 372.

⁵ *In re Weaver*, 116 Pa. St. 225, 228, holding that the remedy in such case is

given by statute, in a jury trial upon traverse; and also, that on objections to the regularity or validity of the proceedings, or misbehavior in office of commissioners or jurors, the court will, in proper cases, set aside or quash the inquisition.

⁶ Coot v. Willet, 93 Mich. 304.

⁷ Gensemer's Estate, 170 Pa. St. 102.

⁸ *De Hart v. Condit*, 51 N. J. Eq. 611, 613.

⁹ 16 & 17 Vict. ch. 70, § 40.

whether of their persons or their property, on the ground that they are of unsound mind, without trial before a jury,¹ it follows that a party who had been found insane under a proceeding of which he had no notice, and at which he was not present, either in person or by attorney, was entitled, as a matter of right, to have the question of his insanity passed upon by a jury of the country, in a court of law, upon a denial of the truth of the finding. By the Lunacy Regulation Act, the alleged person of unsound mind may demand a jury, and having done so, the court can entertain no application for the withdrawal of the demand for a jury in the absence of the alleged lunatic.²

The right of traverse was affirmatively given, in England, by statute³ "if any person be or shall be untruly founden lunatick, idiot, or dead;" "that every person and persons grieved or to be grieved by any such office or inquisition, shall and may have his or their traverse to the same immediately or after," &c.⁴ It is accordingly held that in America, where this statute is not re-enacted, or unless there be some other statutory authority to that effect, this matter is within the sound discretion of the court having jurisdiction over idiots and lunatics, which will direct the course of proceeding on the traverse of the inquisition returned, in such manner as may be most useful and expedient, so as to best inform the conscience of the court or Chancellor. The lunatic may be brought into court, after the inquisition is returned, and inquiry be made by inspection, or an issue may be awarded to ascertain, by a verdict at law, the existence or continuance of the lunacy.⁵ In Pennsylvania the statute authorizes any party aggrieved to traverse the inquisition at any time within three months after its return, unless the time be extended;⁶ and it is held that on the trial of the traverse the burden of proof is on the traverser.⁷ In South Carolina, where jurisdiction in cases of idiocy and lunacy and persons *non compotes mentis* is given con-

And was given
by statute of
2 & 3 Edw. VI.
ch. 8, § 6.

Traverse in
America.

In Pennsylva-
nia.

In South Caro-
lina.

¹ See *ante*, § 119.

² *In re Crompe*, L. R. 4 Ch. App. 653.

³ 2 & 3 Edw. VI. ch. 8, § 6.

⁴ By a subsequent statute the time within which the traverse could be brought was limited to three calendar months: 6 Geo. IV. ch. 53, § 1.

⁵ *Matter of Wendell*, 1 Johns. Ch. 600, 602; *Matter of Tracy*, 1 Paige, 580, 582.

⁶ Bright. Purd. Dig. 1885, p. 1127, §§ 16, 17.

⁷ *McGinnis v. Commonwealth*, 74 Pa. St. 245, 248.

currently to the Probate Court and Court of Common Pleas, it is held that authority to grant a traverse exists only in the Court of Common Pleas;¹ and it is also held that in this State the statute of 2 & 3 Edw. III. c. 8, § 6, providing for a traverse, is in force by virtue of the Act declaring of force all statutes which "declare the rights and liberties of the subject and enact the better securing the same."² In Vermont it is held,

In Vermont.

that in virtue of an Act providing "that in all cases pending before the Supreme Court by appeal from any order, sentence, or decree of any probate court, on application of either party, said Supreme Court may in its discretion cause to be tried by jury in the County Court, any issue of fact between the parties in such case," and in view of well established authorities, that the inquisition is only presumptive evidence of lunacy or insanity, and that a traverse of it is a right by law, and may be sent to a court of common law to be tried by a jury.³

It appears from the language of the statute originally establishing the right of traverse,⁴ that it is within the reach of any person aggrieved by the inquisition. A stranger, having no interest in the question, will not, of course, be allowed to traverse an inquisition of lunacy;⁵ to be aggrieved by the finding, he must be interested in the question at the time of the return.⁶ Thus a purchaser may demand a traverse, when the inquisition upon a person alleged to be of unsound mind relates back, so that the right to property that he has sold may be drawn in question.⁷ It is on the ground that a cloud is cast on the title of a purchaser from a grantor against whom a commission of lunacy was taken out and executed, by the finding in which it appeared that he had been a lunatic without a lucid interval from a time anterior to the date of the conveyance, that a court of equity will, in its discretion, permit a purchaser, whose conveyance is overreached by the inquisition, to traverse the finding of the jury, upon his agreeing to be bound

¹ Walker v. Russell, 10 S. C. 82, 90.

⁶ Armstrong v. Short, 1 Hawks, 11, 14.

² Medlock v. Cogburn, 1 Rich. Eq. 17.

477.

³ Shumway v. Shumway, 2 Vt. 339, 341.

⁷ Nailor v. Nailor, 4 Dana, 339, 346; Matter of Christie, 5 Paige, 242, 244; Medlock v. Cogburn, 1 Rich. Eq. 477; Gensemer's Estate, 170 Pa. St. 96, 99.

⁴ 2 & 3 Edw. VI. ch. 8, § 6.

⁵ Covenhoven's Case, 1 N. J. Eq. 19, 21.

by the final decision upon the traverse.¹ In New York the death of a lunatic, after conveying land, is no bar to a traverse of the inquisition by her grantee, although it bar proceedings to supersede the commission;² but in Pennsylvania it is held, that the death of an alleged lunatic after traverse taken, will end the proceedings, notwithstanding the traverse was taken by a person whose title was affected by the inquisition; but the death of the lunatic will not affect the decree confirming the inquisition.³

The traverse is usually tried in the district where the commission was executed; but it has been held that it is within the discretion of the judge or Chancellor ordering the traverse to have it tried elsewhere.⁴ It

Traverse may be tried at any place directed by the court.

is a summary proceeding, setting out the inquisition and traversing or denying the facts thereby found.⁵ The issue is always the same as in the original inquisition, to wit: Whether the party's mind is unsound to such an extent as to disqualify the traverser from conducting himself with personal safety to himself and others, and from managing and disposing his own affairs and discharging his relative duties.⁶

The issue is the same as on the original inquest.

Where the application for leave to traverse is on behalf of the lunatic, the Chancellor will not grant it as a matter of course, but will satisfy himself, upon a private examination of the lunatic in person, or by a report of a master, whether it is the wish of the lunatic, and whether he is capable of understanding the nature of the application, and grant or refuse the traverse accordingly.⁷

Discretion of the court to grant the traverse.

Where the traverse is granted on the application of some party other than the lunatic, in his own interest, he is liable to pay the costs.⁸

It was held in New Jersey, on the authority of English cases, that a person found lunatic may appear and traverse the inquisition by attorney, but an idiot must appear before the court in person.⁹

¹ *Yawger v. Skinner*, 14 N. J. Eq. 389, 393. And in such case the parties cannot abandon the trial of the issue, to have the validity of the lunatic's conveyance to be decided in some other mode: *Matter of Giles*, 11 Paige, 243.

² *In re Owens*, 18 N. Y. Supp. 850.

³ *Gensemer's Estate*, 170 Pa. St. 96, 99.

⁴ *Ex parte Wilson*, 11 Rich. Ch. 445, 446; *Matter of Nugent*, 2 Molloy, 517.

⁵ *Busw. on Ins.* § 73, note (4), quoting from *Shelf. Lun.* 115.

⁶ *Ordronaux on Ins.* 255, citing Pennsylvania cases.

⁷ *Matter of Christie*, 5 Paige, 242, 243.

⁸ *Matter of Folger*, 4 Johns. Ch. 169.

⁹ *Covenhoven's Case*, 1 N. J. Eq. 19, 23.

It is obvious that where the judgment or decree of the court on a trial of the question of the soundness of a person's mind is conclusive on the party proceeded against, there is no occasion for a traverse. In the States where such is the case, the party has a remedy by motion for a new trial, or by appeal to a higher court; and such person must, as has already been mentioned,¹ have sufficient notice to enable him to defend himself against the allegation of unsoundness of mind, or by his voluntary presence at the trial have waived the service of such notice.²

The effect of a traverse is also attained by the right of the party found to be lunatic, or by any person affected by such finding, to prove, in a collateral proceeding, either that the finding was untrue, or that he has been restored, or that the transaction in question was had during a lucid interval.³ One not concluded by an inquisition, may impugn the finding by contrary evidence, without pursuing the procedure technically called a traverse.⁴

§ 128. **The Inquisition as Evidence.** — The rule is general, that an inquisition under a writ *de lunatico*, or *de idiota, inquirendo*, or the judgment or decree of a court in a proceeding of like nature, is *prima facie*, but not conclusive, evidence of the party's incapacity against persons not parties or privies.⁵ The same is true of the finding of a person to be an habitual drunkard.⁶ In England, it has been said, the ecclesiastical courts look on an inquisition of insanity as only a part of the requisite proof of unsoundness of mind, and demand direct proof to be made in the *cause* of that fact;⁷ and in North

¹ *Ante*, §§ 119 *et seq.*

² *Ante*, § 121.

³ See, on this point, *post*, § 129, on the subject of the effect of the Inquisition.

⁴ *Den v. Clark*, 10 N. J. L. 217.

⁵ *Van Dusen v. Sweet*, 51 N. Y. 378, 385; *Rippy v. Gant*, 4 Ired. Eq. 443, 445; *Armstrong v. Short*, 1 Hawks, 11, 15; *Hill v. Day*, 34 N. J. Eq. 150, 151; *Hutchinson v. Sandt*, 4 Rawle, 234, 239, holding that even members of the inquest, having signed and sealed the inquisition finding the party to be of unsound mind, are competent to prove him to have been of sound mind, or at least to have had lucid

intervals, and that the transaction took place during one of them; *Gangwere's Estate*, 14 Pa. St. 417, 428; *Banker v. Banker*, 63 N. Y. 409, 412; *Breed v. Pratt*, 18 Pickering, 115, 116; *Noel v. Karper*, 53 Pa. St. 97, 99; *Mott v. Mott*, 49 N. J. Eq. 192, citing earlier New Jersey cases; *Devin v. Scott*, 34 Ind. 67, holding that the inquisition is conclusive of the disability of a drunkard to make a contract, and *prima facie* evidence of such incompetence before the inquisition.

⁶ *Lewis v. Jones*, 50 Barb. 645, 646.

⁷ Per Ruffin, J., in *Johnson v. Kincade*, 2 Ired. Eq. 470, 473.

Carolina it was left undecided whether an inquisition of idiocy or lunacy, in the absence of opposing testimony, is sufficient *prima facie* evidence on which to found a decree of nullity of the marriage of such person.¹ In this respect also, the general rule prevails that the inquisition is *prima facie*, but not conclusive, proof of insanity.²

As a corollary to the presumption that every man is sane until the contrary be proved, the law presumes that insanity, having once been shown to exist, continues until the contrary is made to appear. It follows from this rule, that if unsoundness of mind is alleged, the burden to prove it is clearly on the party alleging it; and if proved or admitted to have existed at any particular period, but sanity is alleged at a subsequent particular period, the burden is on the party so alleging to prove either a lucid interval, or complete restoration at the particular period referred to.³ The presumption of the continuation of insanity once proved to have existed, does not apply, however, to cases where the insanity results from a temporary or special cause, such as typhus fever,⁴ delirium,⁵ acute or violent disease,⁶ or delirium tremens.⁷ “Testimony as to previous or subsequent insanity will not answer,” says Justice Field, charging the jury in *Hall v. Huger*,⁸ “unless the insanity be shown to be habitual; that is, *in its nature continuous and chronic*.” So the proof of periodical epileptic attacks attended with convulsions, loss of consciousness, or of temporary pneumonia supervening such attack with fever and delirium, will not justify the presumption of continuing insanity.⁹ So with regard to drunkenness.

Insanity shown to exist, is presumed to continue until sanity be shown.

But not where the insanity resulted from a temporary or special cause.

¹ *Johnson v. Kincade*, *supra*. But see *Cook v. Cook*, 53 Barb. 180, holding that the presumption raised by the prior adjudication of insanity continues and throws the onus of proving sanity on the party alleging it. See also *Rogers v. Walker*, 6 Pa. St. 371, 373; and *Gibson v. Soper*, 6 Gray, 279, holding the converse.

² *Keys v. Norris*, 6 Rich. Eq. 388.

³ *Attorney-General v. Parnter*, 3 Brown's Ch. R. 441, 443; *Stevens v. Vancleve*, 4 Wash. C. C. 262, 269; *Goble v. Grant*, 3 N. J. Eq. 629, 631; and numerous American cases.

⁴ *Halley v. Webster*, 21 Me. 461, 463.

⁵ *Purveyar v. Reese*, 6 Coldw. 21, 28.

⁶ *Hix v. Whittemore*, 4 Met. (Mass.) 545; *Clarke v. Sawyer*, 3 Sandf. Ch. 351, 410 (apoplexy, resulting, in this case, in palsy).

⁷ *State v. Sewell*, 3 Jones, 245.

⁸ 4 Sawy. 672, 680. This case was afterward taken to the Supreme Court of the United States (under the style of *Dexter v. Hall*, 15 Wall. 9), but the point concerning the instruction was not noticed by the Supreme Court, which confirmed the decision of the court below.

⁹ *Brown v. Riggins*, 94 Ill. 560, 565.

If permanent or settled derangement of mind has resulted from habitual indulgence in ardent spirits, so as to constitute general insanity, independent of the immediate effect of drink, the presumption seems applicable that it continues until reformation be proved; but unless such general insanity have resulted, no lucid interval need be proved.¹

Nor is the inquisition *evidence* of insanity prior to the time of which it speaks,² or *conclusive* as to any period, except that covered by the issue on trial;³ and the tendency is, in modern times, to limit the inquiry to the party's condition at the time the inquisition is taken.⁴

Whether, and under what circumstances an inquisition of lunacy may be impeached, has been considered in connection with the subject of Notice⁵ and of the Presence of the Party at the Trial,⁶ and will again be noticed when discussing the validity of appointment of committees or guardians.⁷

§ 129. **Legal Effect of the Inquisition on Subsequent Acts of the Lunatic.** — As a general proposition, the contracts of an insane person whose incapacity has not been judicially declared, are voidable, though not absolutely void, and may, in a proper case, be disaffirmed on restoration, or by the lawful guardian.⁸ But the right to avoid is given for the personal protection of the insane, and those who deal with them have not the corresponding right to avoid a contract made with an insane person.⁹

The authorities are not quite unanimous on this question, some English and some American cases holding that the acts of a man *non compos mentis* are void *ab initio*. Cole, J., in an elaborate review of the history of this question, collects a considerable number of opinions from text-writers

¹ Gardner v. Gardner, 22 Wend. 526, 533.

² Rippey v. Gant, 4 Ired. Eq. 443, 444; Shirleys v. Taylor, 5 B. Mon. 99, 102; Mutual L. Ins. Co. v. Hunt, 79 N. Y. 541, 545.

³ Lucas v. Parsons, 23 Ga. 267, 275; Banker v. Banker, 63 N. Y. 409, 413.

⁴ Matter of Demelt, 27 Hun, 480, 482; Matter of Cook, 25 N. Y. St. Rep. 64; Dominick v. Dominick, 10 N. Y. St. Rep. 32.

⁵ Ante, § 119.

⁶ Ante, § 121.

⁷ Post, § 135.

⁸ McClain v. Davis, 77 Ind. 419. See cases collected by Cole, J., in Allen v. Berryhill, 27 Iowa, 534, 540; Copenrath v. Kienby, 83 Ind. 18, 22, reciting many Indiana cases.

⁹ Allen v. Berryhill, 27 Iowa, 534, 536 et seq.; Harmon v. Harmon, 51 Fed. R. 113, 115; Carrier v. Sears, 4 Allen, 336; Atwell v. Jenkins, 163 Mass. 362.

and judges, *pro* and *con*, and himself reaches the conclusion (dissenting from the majority of his colleagues), "that contracts which are wholly executory, made by persons totally insane, are so far void as that they will not be specifically enforced, even at the suit of the lunatic against the sane party."¹

The lunatic contracting with a sane person has not the same unqualified right to disaffirm his contract, as an infant.

"If a purchase is made in good faith, without any knowledge of the incapacity, and no advantage had been taken of the party, courts of equity will not interfere to set aside the contract, if injustice will thereby be done to the other side, and the parties cannot be placed *in statu quo*, or in the state in which they were before the purchase."²

Lunatic has not the absolute right to disaffirm his contracts.

But where an insane person has been so declared in a judicial proceeding, and been placed under guardianship, he is said to be for most purposes civilly dead,³ and his subsequent acts are generally absolutely void;⁴ although the conservator join the ward in making a deed of his land, it will be void, unless the conveyance be made under authority of the court.⁵ When the inquisition or guardianship, though conclusive of the disability of the ward,⁶ whether in consequence of insanity, or habitual drunkenness, old age, sickness, or other cause whatever;⁷ has been appealed from, the judgment is suspended, and is then only *prima facie* evidence of the party's incompetence, which may be rebutted in support of the validity of the party's acts pending the appeal.⁸

Acts of one judicially found insane usually void.

Inquisition conclusive of disability.

But an inquisition of lunacy does not conclusively negative testamentary capacity; it is held to be never more than *prima facie* evidence of its want, simply shifting the burden of proof upon the party asserting its capacity.⁹

But does not conclusively negative testamentary capacity.

¹ Allen v. Berryhill, 27 Iowa, 534, 559.

² 1 Story Eq. Jur. § 228; Fay v. Burditt, 81 Ind. 433, 438, and numerous cases cited on pp. 439, 440; Riggan v. Green, 80 N. C. 236, citing other authorities, p. 238; to similar effect: McCormick v. Littler, 85 Ill. 62, 65; Lilly v. Waggoner, 27 Ill. 395; Klohs v. Klohs, 61 Pa. St. 245, 249; Thomas v. Hatch, 3 Sumn. 170.

³ McNees v. Thompson, 5 Bush, 686, 687.

⁴ Rannells v. Gerner, 80 Mo. 474; Wait v. Maxwell, 5 Pickering, 217, 220; Pearl v. McDowell, 3 J. J. Mar. 658; Elston v. Jasper, 45 Tex. 409, 413.

⁵ Griswold v. Butler, 3 Conn. 227, 231; Rannells v. Gerner, *supra*; New England L. & T. Co. v. Spitler, 54 Kans. 560, 570.

⁶ Rannells v. Gerner, *supra*; Wadworth v. Sherman, 14 Barb. 169, 171; Leonard v. Leonard, 14 Pickering, 280, 283; Kiehne v. Wessell, 53 Mo. App. 667, 669.

⁷ Rannells v. Gerner, *supra*.

⁸ Grimes v. Shaw, 2 Tex. Civ. Ap. 20, 23.

⁹ Leckey v. Cunningham, 56 Pa. St. 370, 373.

In many of the States it is provided by statute that the person adjudged an idiot, insane, or of unsound mind can make no valid conveyance, contract, or delegation of power after finding of the commission or jury, as for instance in California,¹ Connecticut,² Illinois,³ Indiana,⁴ Kansas,⁵ Louisiana,⁶ Massachusetts,⁷ New Hampshire,⁸ Pennsylvania,⁹ and probably other States; so, with regard to spendthrifts, drunkards, and other incompetent persons, it is provided in many States, that if a copy of the application for a commission or inquisition, together with a copy of the order directing notice to be given to the alleged spendthrift, drunkard, or person of unsound mind, be filed in the registry of deeds, or clerk's office, all contracts (except for necessities), gifts, sales, or transfers of real or personal property shall thereafter be void, if in consequence of the application a guardian is appointed to the alleged incompetent person; this is so, for instance, in Maine,¹⁰ Michigan,¹¹ Minnesota,¹² Nebraska,¹³ Oregon,¹⁴ Vermont,¹⁵ Wisconsin,¹⁶ and perhaps other States.

The statute of Massachusetts containing a similar provision was held to be intended merely to cause the incapacity of the ward, which results from the guardianship, to relate to the date

¹ Civ. Code, 1885, § 40.

² The disability does not commence until a conservator has been appointed: *Baker v. Potter*, 51 Conn. 78.

³ *McCormick v. Littler*, 85 Ill. 62, 64.

⁴ *Redden v. Baker*, 86 Ind. 191, 193.

⁵ Gen. St. 1889, § 3710, without consent of the guardian.

⁶ Rev. Civ. C. 1889, Art. 401.

⁷ In reference to spendthrifts: Publ. St. 1882, ch. 139, § 9.

⁸ Publ. St. 1891, ch. 179, § 7 (spendthrifts, if without guardian's ratification).

⁹ *Tozer v. Saturlee*, 3 Grant's Cases, 162, 164; *Imhoff v. Wittmer*, 31 Pa. St. 243, 244.

¹⁰ Rev. St. 1884, ch. 67, § 7.

¹¹ *Howell's St.* 1882, § 6319.

¹² In this State it is held, that if the provisions of this statute are complied with, persons having real estate transactions with the party will be advised of the fact that he is under guardianship, but the court declines to decide what the effect of non-compliance with the statute

would be: *Thorpe v. Hanscom*, 66 N. W. (Minn.) 1.

It is held in the same case, that if a person, though found to be insane, and under guardianship, be in fact of sound mind, and the guardianship had been practically abandoned, a deed made by him, if fair, is valid, though the guardian had not been formally discharged by the court.

¹³ Comp. St. 1891, ch. 34, § 19.

¹⁴ Code and Gen. L. 1887, § 2893.

¹⁵ Rev. St. 1880, § 2442. In this State the guardian is required, as soon as may be after his appointment, to post up notices in three public places in the town of the ward's residence, declaring that the contracts of the ward will be held void. This requirement must be strictly complied with, to enable the guardian to avoid contracts made by the ward with persons ignorant of his disability: *Ellis v. Cramton*, 50 Vt. 608.

¹⁶ Ann. St. 1889, § 3979.

of the filing of the copy of the complaint and order, which is thereby made constructive notice to all the world of the pending and possible result of the proceedings. Hence, the indorsing of a promissory note made by a spendthrift under guardianship conveys no title in the note to the indorsee, although no copy of the complaint for the appointment of a guardian was filed in the registry of deeds, every result stated in the section providing for such notice following as of course from the fact of the guardianship when judicially established.¹ The promise by a spendthrift under guardianship to pay a debt will not take it out of the statute of limitations;² but a promissory note given by a spendthrift was held in Massachusetts not to come under the disabling statute, which makes void "all and every gift, bargain, sale, or transfer of any real or personal estate," but makes no mention of a promissory note.³ In New Hampshire the disability of the ward is held to begin with the filing of the petition for the inquisition with the clerk;⁴ but in Connecticut the disability does not begin until the conservator has been appointed and given bond.⁵ In Iowa, in a proceeding to annul a marriage on the ground of the insanity of one of the parties, it was decided that the institution of proceedings in the Circuit Court for the appointment of a guardian, together with the appointment of a temporary guardian, is not sufficient to fix notice of the insanity of such party on one about to marry him.⁶

Constructive
notice of disa-
bility.

In Kentucky the confinement of a public officer in an insane asylum pursuant to a judicial finding that he is a lunatic, creates a vacancy in the office held by him; and if an election is held to fill the vacancy, the former incumbent has no right, on being cured, to have the office restored to him.⁷

§ 130. **Supersedeas of the Commission on Restoration.** — On the restoration of a lunatic or person of unsound mind to reason, and on the reformation of a habitual drunkard or spendthrift, the occasion for the interference of the State with their affairs or conduct ceases, and such person has the right to be put in possession of his property,

On restoration
to reason the
commission
in lunacy is
superseded.

¹ *Lynch v. Dodge*, 130 Mass. 458.

² *Mauser v. Tilton*, 13 Pickering, 206.

³ *Smith v. Spooner*, 3 Pickering, 229, 230. The reasoning of Parker, C. J., was, that disabling statutes should be construed strictly, being in derogation of private rights; and that if the note was given

without consideration, it could be avoided; if with consideration, the spendthrift had received his equivalent.

⁴ *McCrillis v. Bartlett*, 8 N. H. 569.

⁵ *Baker v. Potter*, 51 Conn. 78.

⁶ *Barber v. Barber*, 74 Iowa, 301.

⁷ *Long v. Bowen*, 94 Ky. 540.

and to demand the discontinuance of the guardianship over him. This is accomplished by a proceeding known, under the English practice and in such of the States as have retained the same, as the *supersedes* of the commission. No such remedy was given to idiots, because the malady, existing from the birth of the party, was presumed to be incurable, and gave to the crown the bene-

In such case, and on the reformation of drunkards and spendthrifts, guardianship ceases,

ficial use of his lands during his lifetime. But to lunatics and persons of unsound mind the *supersedes* enured as a right of action.¹ The practice in the case of a habitual drunkard is substantially the same as in case of a lunatic.² The commission ought not to be

superseded upon an *ex parte* hearing without notice, on the evidence of affidavits merely, even with the assent of the guardian;³ and in cases of habitual drunkenness

Reformation of drunkards for at least one year.

there should be evidence of permanent reformation, — satisfactory proof of voluntary refraining from the use of intoxicating liquors for at least one year immediately preceding the application.⁴ The Chancellor may order the

Hearing in chancery.

petition to be referred to the master to take proof of the allegations, and if he thinks proper to examine

the party and to report the proof and his opinion thereon; or to cause the party himself to be brought into court and examined by the Chancellor in person.⁵ A committee of the person and estate of one found to be a lunatic cannot, as was held in New York, be discharged as committee of the person, where it does not appear that he is yet competent to manage his estate.⁶

The court having jurisdiction over a person of unsound mind may discharge or suspend proceedings against him partially, re-

Temporary or partial suspension of guardianship.

taining the control of his property so far only as may be deemed necessary to protect the same for his benefit; it may allow the party to make a testamentary

disposition of a portion of his estate, without at the same time either superseding the commission or surrendering the property into his control.⁷ The fact that a traverse of the inquisition is

¹ *Ex parte* Drayton, 1 Desaus. 144; Matter of Price, 8 N. J. Eq. 533; Matter of Rogers, 5 N. J. Eq. 46.

² Matter of Weis, 16 N. J. Eq. 318.

³ Matter of Weis, *supra*.

⁴ Matter of Hoag, 7 Paige, 312, 313; Matter of Weis, *supra*.

⁵ Matter of Hanks, 3 Johns. Ch. 567.

⁶ Matter of Burr, 17 Barb. 9.

⁷ Hovey v. Harmon, 49 Me. 269, 272, referring to Matter of Burr, 2 Barb. Ch. 208, 210, in which Chancellor Walworth remarks that "this has frequently been done by the court in the case of habitual

pending does not supersede the powers of a committee appointed thereunder ; hence, where a distributee has been found lunatic, and a committee appointed by the court having jurisdiction to do so, the jurisdiction of that court attaches, and the court distributing the estate has no power over the lunatic, although a traverse of the inquisition be pending.¹

Pendency of traverse does not supersede powers of committee.

The restoration of persons under guardianship, having been found of unsound mind, to their status as persons *sui juris*, is now provided for by statute in probably all of the States. In most of them the parties may themselves petition for the *supersedeas* of the commission, or the revocation of the guardianship;² or the petition may be filed for them by the guardian, any relative within the third degree,³ or next of kin, or any friend, and in some States by any person.⁴ In New Jersey it is held that the party himself ought to petition.⁵ The petition alleging restoration of the party that had been found lunatic, and asking for an order to be put in possession of his property, is not an original proceeding, but a further proceeding in the original cause.⁶

Petition for restoration may be by the party, his guardian, next of kin, or any person, as provided by statute.

In Indiana it cannot, but in New Jersey it must, be by the party himself.

The petition is but a step in the original proceeding.

The discharge of a patient from the lunatic asylum, because the officers adjudged him restored, has been said to be *prima facie* evidence to rebut the presumption of continuing insanity once judicially ascertained until restoration is established.⁷

Discharge from asylum *prima facie* proof of restoration.

drunkards, who had been found incapable of governing themselves and managing their property, and who were actually endeavoring to abandon their former degrading habits, but who had not yet so far overcome the cravings of their diseased appetites as to render it safe to put their property wholly under their control:" p. 210. The Chancellor directed the discharge of the petitioner from the commission and inquisition so far as to permit him to make a will under the advice and with the sanction of the vice-chancellor; which he was at liberty to revoke *in toto*, but not in part, nor should he be allowed to make a new will without such advice and consent, until the further order of the court.

cation must be made by some other person: Gillespie v. Thompson, 7 Ind. 353; Meharry v. Meharry, 59 Ind. 257, 260.

³ So provided in Arizona: Rev. St. 1887; California: C. C. P. 1885, § 1766; Dakota: Comp. L. 1887, § 5999; Montana: Comp. St. 1888, Prob. Pr. Act, Art. 366; Oklahoma: St. 1890, § 1496; Utah: Comp. L. 1888.

⁴ For instance, in Colorado: Mills' St. 1891, § 2961; Idaho: Rev. St. 1887, § 5787; Kansas: Gen. St. 1889, § 3713; Missouri: Rev. St. 1889, § 5549; Texas: Sayles' Civ. St. 1888, § 2668; Wyoming: Rev. St. 1887, § 2323.

⁵ Matter of Price, 8 N. J. Eq. 533.

⁶ Ayers v. Mussetter, 46 Ill. 472, 474.

⁷ Haynes v. Swann, 6 Heisk. 560, 587 (dictum).

¹ Estate of Frey, 12 Phila. 1.

² In Indiana it is held that the appli-

The guardianship may be revoked, in some States, on the simple consent of the guardian, if there is no contest, and the court be satisfied that the allegations in the petition are true.¹ But in most States there must be a regular trial before,² or, if not demanded by either party, without a jury.³

Revocation on consent of guardian, but generally after trial before or without a jury.

Notice must be given of such trial to the guardian, relatives, parents, and husband or wife.

Notice of such trial is required, generally, to be given to the guardian; in some States also to the relatives,⁴ to the parents,⁵ and to the husband or wife, if living in the county.⁶ In Michigan such notice is held necessary, although not required by statute.⁷

"Public Notice" is required in Connecticut.⁸ In Georgia⁹ it is provided that the guardian, or any relative, may contest the petition for revocation of the guardianship; so in Idaho, where any person may contest.¹⁰ In Minnesota the judge may, in his discretion, allow any person to contest on the judicial determination of the fact of restoration.¹¹ So in Utah.¹² The statute directs the judge or Chancellor to order the delivery and payment of all property, real and personal, and the transfer of all stock and investments remaining in the hands of the trustee at the time of the death or recovery of the insane person, to him or his personal representatives, without providing for the procedure of

Guardian may contest such petition, or any relative, or any person.

Court to order the delivery of all property to the ward or his representative on recovery or death.

¹ For instance, in Alabama: Code, 1886, § 2399; Georgia: Code, 1882, § 1861.

² So in Alabama (if the guardian deny the truth of the facts stated in the petition); Arkansas: Rev. St. 1887; Georgia (if there is a contest): Code, 1882, § 1861; Idaho: Rev. St. 1887; Illinois: Rev. St. 1889, ch. 85, § 28; Missouri: Rev. St. 1889, § 5549; Texas (if doubtful): Sayles' Civ. St. 1888, Art. 2669; Wyoming: Rev. St. 1887, § 2323.

³ As in Arizona: Rev. St. 1887, § 1340; California: C. C. P. 1885, § 1766; Montana: Comp. St. 1888, Prob. Pr. Act, § 366; Kansas: Gen. St. 1889, § 3713. In Texas there must be a jury if the recovery is doubtful; but the court may discharge the commission without a jury if there is no doubt: Sayles' Civ. St. 1888, §§ 2669

2670. In New York the method of trial, whether by the court, or by a jury, or by a referee is in the discretion of the court: *Matter of Blewitt*, 138 N. Y. 148.

⁴ In Alabama, Arizona, Michigan, Minnesota.

⁵ In Arizona, California, Dakota, Idaho, Michigan, Montana, Oklahoma, Utah.

⁶ In Arizona, California, Dakota, Michigan, Montana, Oklahoma, Utah.

⁷ *Storms v. Circuit Judge*, 99 Mich. 144.

⁸ Gen. St. 1888, § 481. So, too, in Illinois: Rev. St. 1889, ch. 86, § 27.

⁹ Code, 1882, § 1861.

¹⁰ Rev. St. 1887, § 5787.

¹¹ St. 1891.

¹² Comp. L. 1888.

ascertaining the recovery or restoration, in Delaware,¹ Mississippi,² North Carolina,³ Ohio.⁴

In Massachusetts⁵ the statute directs the guardianship to terminate when no longer necessary. In New Hampshire it is held that the revocation of guardianship is not prevented by a pending process of settling the ward's estate in the insolvent course.⁶

In a proceeding to set aside the guardianship of an insane person the question is whether such person has so far regained his reason as to be able to manage his estate; and if the jury do not so find, the guardianship must continue.⁷

Question in such proceeding is, whether the ward is capable of managing his affairs.

On a petition for restoration by one found insane under a commission of which she alleges she had no notice, it is error not to allow her to appear in person to be examined as to her mental soundness.⁸

¹ Rev. C. 1874, ch. 49, p. 241, § 6.

² Code, 1892, § 2213.

³ Code, 1883, § 1672. See *Ex parte* Latham, 6 Ired. Eq. 406.

⁴ Rev. St. 1890, § 6316.

⁵ Publ. St. 1882, ch. 139, § 12.

⁶ *Pettes v. Upham*, 59 N. H. 149.

⁷ *Cochran v. Amsden*, 104 Ind. 282
Matter of Brugh, 61 Hun, 193 (giving tests of recovery).

⁸ *In re Lowe*, 19 N. Y. Sapp. 245.

CHAPTER XVI.

OF GUARDIANS TO PERSONS OF UNSOUND MIND.

§ 131. **Functionaries in Charge of Persons of Unsound Mind.** — Guardians to idiots, lunatics, insane persons, drunkards, spend-thrifts, or persons who, from any cause or for any reason, are mentally incompetent to manage themselves or their estates, are appointed by the courts having jurisdiction for this purpose,¹ on the legal ascertainment of such incompetency. They are known in the different States by various names. Under the English system, the functionary to whom was committed the custody of the lunatic and the care of his property, was appointed by the Lord Chancellor, — not *virtute officii*, but by delegation of power from the king, upon whom devolved the safe-keeping of the property and the maintenance of the lunatic. The persons so appointed were the mere agents, receivers, or bailiffs of the crown, and were called *committees*, being accountable to the Chancellor as keeper of the king's conscience. They had no title to the property of the lunatic; nor were they representatives of the lunatic so as to sue or be sued as such.² In America, even in States where the jurisdiction over persons of unsound mind is still vested in chancery courts, the English doctrine is modified because the powers over the person and estate of the lunatic and his maintenance are by statute expressly committed to the Chancellor.³ But in those States in which power over insane persons, or of persons mentally incapable of managing their affairs, is vested in courts of probate jurisdiction, and exercised by officers appointed by such courts, the functions, powers, and duties of these officers are generally identical with or

Guardians are appointed on legal ascertainment of incompetency.

Known in England as committees.

In America their functions are identical with or analogous to guardians or curators of minors,

¹ *Ante*, § 116.³ Kent, Ch., in *Brasher v. Van Cort-*² *Van Horn v. Hann*, 39 N. J. L. 207, landt, 2 Johns. Ch. 242, 246.
209.

closely analogous to those of the guardians or curators over minors.¹ Hence, those in charge of the persons or estates of persons of unsound mind are in most States called, ^{and are known as} like those in charge of the persons or estates of ^{guardians, curators,} minors, "guardians" or "curators." So in Alabama,² Arkansas,³ Arizona,⁴ California,⁵ Dakota,⁶ Florida,⁷ Georgia,⁸ Idaho,⁹ Indiana,¹⁰ Iowa,¹¹ Kansas,¹² Maine,¹³ Massachusetts,¹⁴ Michigan,¹⁵ Minnesota,¹⁶ Mississippi,¹⁷ Missouri,¹⁸ Montana,¹⁹ Nebraska,²⁰ Nevada,²¹ New Hampshire,²² New Jersey,²³ North Carolina,²⁴ Ohio,²⁵ Oregon,²⁶ Rhode Island,²⁷ Tennessee,²⁸ Texas,²⁹ Utah,³⁰ Vermont,³¹ Wisconsin,³² and Wyoming.³³ The English name "committee" is retained for them in ^{committees,} Kentucky,³⁴ Maryland,³⁵ New York,³⁶ Pennsylvania,³⁷ South Carolina,³⁸ Virginia,³⁹ and West Virginia.⁴⁰ The name of "conservator" is applied to them in Colorado,⁴¹ Con- ^{conservators,} necticut,⁴² and Illinois;⁴³ "trustee" in Delaware ^{trustees,} and Maryland,⁴⁵ and "curator" and "undercurator" ^{curators and undercurators,} in Louisiana.⁴⁶ The name "overseer" has sometimes ^{overseers.} been applied to functionaries appointed by the select-

¹ See *post*, on the functions of guardians of persons of unsound mind, § 137.

² Code, 1886, § 2395.

³ Dig. 1894, § 3817.

⁴ Rev. St. 1887, § 2158.

⁵ C. C. P. 1885, § 1764.

⁶ Comp. L. 1887, § 5997. North Dakota, Rev. Code, 1895, § 6549.

⁷ Rev. St. 1892, § 982.

⁸ Code, 1882, § 331, pl. 5. The office of "commissioner" of a lunatic is not known to the law of Georgia: *Ross v. Edwards*, 52 Ga. 24, 27.

⁹ Gen. St. 1887, § 5785.

¹⁰ Ann. Rev. 1894, § 5744.

¹¹ McClain's Ann. Code, 1888, § 3463.

¹² Gen. St. Ann. 1889, § 3681.

¹³ Rev. St. 1884, ch. 67, § 4.

¹⁴ Publ. St. 1882, ch. 139, § 7.

¹⁵ Howell's St. 1882, § 6315.

¹⁶ St. 1891, § 5754.

¹⁷ Ann. Code, 1892, § 2212.

¹⁸ Rev. St. 1889, § 5517.

¹⁹ Comp. St. 1895, § 2971.

²⁰ Comp. St. 1891, ch. 34, § 15.

²¹ Gen. St. 1885, §§ 561, 1457.

²² Publ. St. 1891, ch. 179.

²³ Rev. 1877, p. 601, § 1.

²⁴ Code, 1883, § 1670.

²⁵ Rev. St. 1890, § 6302.

²⁶ Code and Gen. L. 1887, § 2889.

²⁷ Publ. St. 1882, ch. 168, § 7.

²⁸ Code, 1884, § 4436.

²⁹ Sayles' St. 1888, § 2658.

³⁰ Comp. L. 1888, § 4319.

³¹ Rev. St. 1880, § 2436.

³² Ann. St. 1889.

³³ Rev. St. 1887, § 2291.

³⁴ St. 1894, § 2149. See *Shaw v. Dixon*, 6 Bush, 644.

³⁵ Also called trustee.

³⁶ Bliss' Ann. C. 1890, § 2322.

³⁷ Bright. Purd. Dig. 1885; *Black's Case*, 18 Pa. St. 434.

³⁸ *Walker v. Russell*, 10 S. C. 82; Rev. St. 1893.

³⁹ Code, 1887, § 1697.

⁴⁰ Code, 1891; *Hinchman v. Ballard*, 7 W. Va. 152, 180.

⁴¹ Mills' St. 1891, § 2935.

⁴² Gen. St. 1887, § 475.

⁴³ Rev. St. 1889, ch. 86, § 1.

⁴⁴ Rev. C. 1874, ch. 49, § 1.

⁴⁵ Also called "committee" in this State.

⁴⁶ Voorh. Rev. C. C. 1889, Arts 404, 406.

men of a town or township over persons likely to be reduced to want by idleness, mismanagement or bad husbandry, who thereupon were disabled from making any bargain or contract without the consent of such overseer.¹ This power of the selectmen was held not to be a judicial power, so as to protect them against an action for damages for its unwarranted and careless exercise,² but to be strictly exercised within the strict letter of the statute, otherwise it was held void.³

It has been decided, that where a statute requires appearance of a person by committee, without a statutory definition of the word

“committee,” appearance by a general guardian is a sufficient compliance with the statute if such guardian have the powers of a committee under the English law;⁴ and whether the person appointed curator of the person and estate of a lunatic is styled committee or guardian.⁵

§ 132. Power to appoint Guardians to Persons of Unsound Mind.

— The appointment of guardians to persons of unsound mind is

within the scope⁶ and discretion of the Court of Chancery. Chancellor Kent refused to appoint a committee to one whom the jury found to have been born deaf and dumb, and had continued so.⁷ But no guardian

or committee can be appointed, unless the party's unsoundness of mind has been established as an independent proposition, and that the incapacity to manage his affairs is the result of such unsoundness of mind.⁸ Where the inquisition is void for the want of notice, the appointment of a guardian thereunder is self-evidently void also.⁹

Where jurisdiction over insane persons is vested in probate courts or courts other than chancery courts, it is generally pro-

¹ Strong v. Birchard, 5 Conn. 357, 361; Chalker v. Chalker, 1 Conn. 79.

² Johnson v. Stanley, 1 Root, 245.

³ Chalker v. Chalker, *supra*.

⁴ Symmes v. Major, 21 Ind. 443, 447.

⁵ Van Horn v. Hann, 39 N. J. L. 207, 211.

⁶ Rev. Code Del. 1874, ch. xlix. § 1; Ann. Code Miss. 1892, § 2212; Rev. N. J. 1877, p. 601, § 1.

⁷ Brower v. Fisher, 4 Johns. Ch. 441, 443. To same effect: Matter of Morgan, 7 Paige, 236; Matter of Colvin, 3 Md. Ch.

278, 282; Heckman v. Adams, 50 Oh. St. 305, 315.

⁸ Matter of Morgan, *supra*; Matter of Shaul, 40 How. Pr. 204; Hovey v. Harmon, 49 Me. 269; H— v. S—, 4 N. H. 60; Matter of Dey, 9 N. J. Eq. 181; Hamilton v. Traber, 78 Md. 26, 29; Evans v. Johnson, 39 W. Va. 299; Coolidge v. Allen, 82 Me. 23, 25; Coon v. Cook, 6 Ind. 268, 271; Moody v. Bibb, 50 Ala. 245, 247.

⁹ Molton v. Henderson, 62 Ala. 426, 430.

vided by statute that after inquisition and judgment or decree finding a party to be of unsound mind and incapable of managing his affairs, it is the duty of such court to appoint a guardian, conservator, &c., for the protection of such party and his property. Substantially so provided in Alabama,¹ Arkansas,² Arizona,³ California,⁴ Dakota,⁵ Georgia,⁶ Idaho,⁷ Illinois,⁸ Indiana,⁹ Iowa,¹⁰ Kansas,¹¹ Kentucky,¹² Louisiana,¹³ Massachusetts,¹⁴ Michigan,¹⁵ Minnesota,¹⁶ Missouri,¹⁷ Montana,¹⁸ Nebraska,¹⁹ Nevada,²⁰ New Hampshire,²¹ North Carolina,²² Ohio,²³ Oregon,²⁴ Pennsylvania,²⁵ Rhode Island,²⁶ Tennessee,²⁷ Texas,²⁸ Utah,²⁹ Vermont,³⁰ Virginia,³¹ West Virginia,³² Wisconsin,³³ and Wyoming.³⁴ It is held in Iowa that where the record shows the appointment of a guardian *ad litem* and the appointment of a guardian, the fact will be presumed that the mental unsoundness alleged in the petition had been proved, though the record be silent in this respect.³⁵

Duty of courts to appoint as a consequence of finding one *non compos mentis*.

The power of courts of chancery to appoint guardians to insane married women is well established, recognized in England³⁶ as well as in the United States.³⁷

Guardians may be appointed to insane married women.

¹ Code, 1886, § 2391.

² Dig. 1894, § 3814.

³ Rev. St. 1887, § 2158.

⁴ C. C. Pr. 1885, § 1764.

⁵ Comp. L. 1887, § 5997. North Dakota: Rev. Code, § 6550.

⁶ Code, 1882, §§ 331, 1852.

⁷ Rev. St. 1887, § 5785.

⁸ Rev. St. 1896, ch. 86, § 1.

⁹ Ann. Rev. 1894, §§ 5744, 2716.

¹⁰ *Tiffany v. Worthington*, 65 N. W. (Iowa) 817.

¹¹ Gen. St. 1889, § 3681.

¹² St. 1894, § 2149.

¹³ Voorh. Rev. Civ. C. 1889, Arts. 404, 406.

¹⁴ Publ. St. 1882, ch. 139, § 7.

¹⁵ Howell's St. 1882, § 6315.

¹⁶ St. 1891, § 5754.

¹⁷ Rev. St. 1889, § 5517.

¹⁸ Comp. St. 1895, Civ. Code, § 337.

¹⁹ Comp. St. 1891, ch. 34, § 14.

²⁰ Gen. St. 1885, § 1458.

²¹ Publ. St. 1891, ch. 179, § 2.

²² Code, 1883, § 1670.

²³ Rev. St. 1890, § 6302.

²⁴ Code and Gen. L. 1887, § 2889.

²⁵ Bright. Purd. Dig. 1883, p. 1127, § 19.

²⁶ Publ. St. 1882, ch. 168, § 7.

²⁷ Code, 1884, § 4436.

²⁸ Sayles' Tex. Civ. St. 1888, § 2658.

²⁹ Comp. L. 1888, § 4319.

³⁰ Rev. St. 1894, § 2751.

³¹ Code, 1887, § 1697.

³² Code, 1891, ch. 58, § 33.

³³ Ann. St. 1889, §§ 3978, 3990.

³⁴ Rev. St. 1887, § 2291.

³⁵ *Ockenden v. Barnes*, 43 Iowa, 615, 616; *Guthrie v. Guthrie*, 84 Iowa, 372, 376.

³⁶ See authorities cited in *Tillinghast v. Holbrook*, 7 R. I. 230, 245.

³⁷ The right of appointment is held to be conferred on the Probate Court under a statute providing that "whenever any idiot or lunatic, or person *non compos mentis*, or any person who, for want of discretion in managing his estate, shall be likely to bring himself and family to want, and thereby to render himself and family chargeable . . . the Court of Probate . . . shall have the right to appoint a guardian of the person and estate of such person:" *Tillinghast v. Holbrook*, 7 R. I. 230, 245 *et seq.*

It seems that the power of a court to appoint a guardian is superior to the testamentary devise of the custody of a lunatic to a trustee, by the lunatic's father,¹ unless the lunatic were a minor; the father may dispose of the guardianship of his minor child, whether lunatic or not, but has no such power after the child's majority, though it be a lunatic.² The general guardian of a minor is the custodian of his person and estate, so long as he is a minor, although he be of unsound mind; an act done by such guardian in relation to his estate is as valid as if done by a committee appointed to take charge of him and his estate as a person of unsound mind.³ In Washington the power to appoint guardians for those whose mind has become unsound from the constant and excessive use of alcoholic liquors, thereby rendering them incapable of conducting their own affairs, is deduced from the statute giving the Superior Court power to appoint guardians to take the care, custody, and management of all idiots, insane persons, "and all who are incapable of conducting their own affairs."⁴

It has been held, that the court has no power to appoint a guardian in place of a former guardian deceased, without notice to the ward;⁵ but in Ohio it was decided that no notice to the patient is necessary for the appointment of a guardian to one who had been adjudged insane in a proper proceeding;⁶ and, *a fortiori*, no such notice is necessary to the husband of a wife who has been adjudged insane.⁷

In Mississippi a guardian is to be appointed by the Chancery Court to take charge of the estate of a convict sentenced to imprisonment for a year or longer. On the expiration of the term of imprisonment or death of the convict, the guardianship ceases.⁸

¹ Matter of Booth, 15 Law Times (O. S.), 429; *Ex parte Ludlow*, 2 P. Wms. 635, 638.

² *Ex parte Ludlow*, 2 P. Wms. 635, 638.

³ *Francklyn v. Sprague*, 121 U. S. 215, 229.

⁴ *Guardianship of Wetmore*, 6 Wash. 271, 273.

⁵ "Nor would the existence of insanity be a good reason for dispensing with the notice. A man may be insane, so as to be a fit subject for guardianship, and yet have

a sensible opinion and a strong feeling upon the question who that guardian should be. And that opinion and feeling it would be the duty as well as the pleasure of the court anxiously to consult, as the happiness of the ward and his restoration to health might depend upon it:" *Allis v. Morton*, 4 Gray. 63, 64.

⁶ *Leffel v. Knoop*, quoted in *Heckman v. Adams*, 50 Oh. St. 305, 316.

⁷ *Heckman v. Adams*, *supra*.

⁸ Code, 1892, § 2218.

A probate judge who is interested as a party in the matter brought before him for adjudication, is disqualified as a judge. Hence, where the statute makes the selectmen of a town necessary parties in the proceedings for the appointment of a conservator, the probate judge of the district cannot try such case if he be also one of the selectmen.¹

Interest disqualifying judge.

§ 133. **Considerations governing the Appointment of Guardians to Persons of Unsound Mind.** — An old English rule discriminated against the heir at law, or the one next entitled to the lunatic's real estate after his death, as custodian of the lunatic's person.² This maxim was severely criticised, as not founded on reason, and prevailing only in the barbarous times before the nation was civilized.³ A similar objection existed, also, though to a far more limited extent, against the next of kin to the lunatic.⁴ Both these rules are now disregarded in England as well as in the United States;⁵ on the contrary, "the law now supposes that those who stand nearest to the lunatic by the ties of kindred, will treat him with more affection and patient fortitude than strangers in blood."⁶ Hence, consanguinity, though it confers no positive title,⁷ is now considered as a recommendation in the selection of a guardian or committee, and strong ground must be shown before it will be disregarded.⁸ So it has been said that it is almost a matter of course to appoint a son, if no particular objection exist against him, committee of his lunatic father,⁹ or a father of his lunatic son, on giving bond.¹⁰ So, although there is no rule of law requir-

Ancient rule discriminating against heir at law,

and against the next of kin as guardian of a lunatic,

now disregarded.

Consanguinity confers no absolute right, but is a strong recommendation.

Son should be appointed, if not objectionable.

¹ Nettleton's Appeal, 28 Conn. 268, 270.

² *Ex parte Ludlow*, 2 P. Wms. 635, 638.

³ "It is very shocking," says Lord Macclesfield, "to think that any brother or uncle would commit murder on his own brother or nephew, to get his estate:" *Dormer's Case*, 2 P. Wms. 262, 264.

⁴ "For," says the Chancellor in *Neal's Case*, in explaining why the rule was less pronounced against the distributee than against the heir, "the personal estate may increase, and probably will, by good management, during the lifetime of the luna-

tic; thus the longer the lunatic lives, it will be the better for the next of kin:" 2 P. Wms. 544. See also *Ex parte Ludlow*, *supra*.

⁵ *Matter of Livingston*, 1 Johns. Ch. 436; *Ex parte Richards*, 2 Brev. 375.

⁶ *Matter of Colvin*, 3 Md. Ch. 278, 285.

⁷ *Matter of Colvin*, *supra*; *Matter of Owens*, 5 Daly, 288, 290.

⁸ *Matter of Colvin*, *supra*; *Johnson v. Kelley*, 44 Ga. 485.

⁹ *Matter of Bangor*, 2 Moll. 518.

¹⁰ *Coleman v. Commissioners*, 6 B. Mon. 239, 243.

So the husband ing the appointment of the husband to be the guardian of his lunatic wife, as a matter of right, if he be unfit for the duties of guardian,¹ yet he should be preferred, if he is otherwise suitable.² Under like circumstances, husbands will be and wife. appointed committees of their wives, and wives of their husbands.³ The custody of lunatics has been awarded to a *feme covert*, though under the power of her husband;⁴ but it is said to have been usual in England, in such cases, to join some one with her.⁵ In the United States it is enacted by statute, in some instances, that the wife, if otherwise suitable, may be appointed.⁶

It is not a matter of course to commit the guardianship of the estate of a lunatic to those who are presumptively entitled to it upon his death, as his heirs or next of kin; but they will be appointed if it satisfactorily appears that they are the persons most likely to protect the property from loss.⁷ The governing principle on which courts act in appointing a guardian is the interest of the lunatic himself, and not that of those who may have the right of succession,⁸ or the next of kin.⁹ It may be proper to notify the next of kin that they may have the opportunity to propose themselves as committee;¹⁰ but where a mother consented to the appointment of a stranger as committee of her lunatic daughter, it was held that such appointment was not irregular or improper on the ground that no notice had been given the lunatic's sister.¹¹ Love, ties of blood, affinities of relationship, similar-

¹ Matter of Fegan, 45 Cal. 176; Gardner v. Maroney, 95 Ill. 552, 557; Matter of Davy, L. R. 3 Ch. (1892) 38.

² Drew's Appeal, 57 N. H. 181. Husband or wife is in some instances pointed out by statute as guardian for the other: Texas Stat. 1888, Art. 2662. In Louisiana the married woman who is interdicted, is "of course" under the curatorship of her husband: Voorh. Rev. Code, 1888, Art. 412. See Francke v. His Wife, 29 La. An. 302, 307.

³ Ordronaux on Insanity, p. 264; Chancellor Bland in Gibson's Case, 1 Bland, Ch. 138, 141.

⁴ Lord Parker, in Kingsmill, *ex parte*, quoted in a note to Sheldon v. Aland, 3 P.

Wms. 104, 111; Wenman's Case, 1 P. Wms. 701.

⁵ Ordronaux Ins. p. 264.

⁶ For instance in Ohio: Rev. St. 1890, § 6303.

⁷ Matter of Taylor, 9 Paige, 611, 618.

⁸ Matter of Page, 7 Daly, 155, 160; Matter of Cook, 25 N. Y. State R. 64, 65; s. c. 6 N. Y. Supp. 720.

⁹ It is held in Massachusetts, that on the death of the guardian of an insane person, no new guardian can be appointed without notice to the ward: Allis v. Morton, 4 Gray, 63.

¹⁰ Matter of Owens, 5 Daly, 288, 291; Matter of Lamoree, 32 Barb. 122, 124.

¹¹ Matter of Owens, 5 Daly, 288.

ity of habit, taste, and association ought to be weighed and considered in determining who is to be the guardian.¹ There may be circumstances under which the court will consult and regard, so far as may be possible and proper to do so, the wishes and inclinations of the lunatic himself.² Persons whose residence and occupation permit frequent visits of the lunatic and superintending his affairs should be preferred,³ and none who reside beyond the jurisdiction of the court should be appointed.⁴ Although it is usual to appoint the party nominated by the person suing out the commission, yet the court has full power to appoint, in its discretion, any suitable person,⁵ and a *caveat* may be entered against the person so nominated, in which case the recommendations of parties interested will be considered, and proof taken to aid the court in making a selection.⁶ So, in Louisiana, where curators are recommended by family meetings, they are not limited to applicants for the position, nor to parties suggested by relations of the interdict.⁷

Love, affection, disposition may all be weighed;

and the wishes of the lunatic himself may be consulted.

Proximity of residence desirable.

Non-residents should not be appointed.

Applicants are usually appointed;

but any suitable person, though not applying, may be chosen.

The appointment of guardians to persons of unsound mind is in many cases regulated by statute. Thus, in Georgia, among collaterals applying, the nearest of kin by blood is to be preferred, if otherwise unobjectionable,⁸ and the wife has preference.⁹ In Alabama, the nearest relative, or person who will best manage the estate.¹⁰ In New York, the statute allows the same person to be committee of the person and of the estate, or different persons.¹¹ Although it is usual to appoint only one person to be the committee of the person and estate, yet there may be circumstances making it proper to appoint one for the person, and another for the estate,¹² or several guardians may be appointed,¹³ or one for the estate

Preference indicated by statutes.

Same or different persons as committee of person and of estate.

One or more guardians.

¹ Johnson v. Kelley, 44 Ga. 485, 487.

² Matter of Leacocke, Lloyd & Goold, 498, 502; Allis v. Morton, 4 Gray, 63, 64.

³ Ex parte Fermor, Jacob, 404, 405.

⁴ Morgan's Case, 3 Bland, Ch. 332, 335.

⁵ Halett v. Patrick, 49 Cal. 590, 594; Matter of Colvin, 3 Md. Ch. 278.

⁶ Matter of Colvin, 3 Md. Ch. 278, 282.

⁷ Interdiction of Bothick, 44 La. An. 1037, 1042.

⁸ Johnson v. Kelley, 44 Ga. 485, 488.

⁹ Code, 1882, § 1854.

¹⁰ Code, 1886, § 2404.

¹¹ Bliss' Ann. Code, § 2322.

¹² Matter of Colvin, 3 Md. Ch. 278, 282.

¹³ Wis. Ann. St. 1889, § 3990; see Raymond v. Wyman, 18 Me. 385.

only.¹ And it was held in Missouri, where the statute directs the court, after inquisition, to appoint a guardian of the person and estate of the insane person,² that the appointment of a guardian of the estate only is valid, where the court could find no person willing to accept the office of guardian of the person; and that it was immaterial whether the person so appointed was designated "guardian" or "curator," since in respect of the estate the terms meant the same thing.³ In Louisiana, the

Incapacity of woman to be curatrix is no bar to her appointment as curatrix of her husband.

otherwise absolute incapacity of a woman to be curatrix has been removed to the extent of allowing a wife to be appointed curatrix of her interdicted husband, if recommended by the family meeting; the right of the husband to the curatorship of his interdicted wife is absolute.⁴ Where there are two guardians of a spendthrift, it is competent for one of them to receive payment of a debt due to the ward, of which payment his receipt is *prima facie* evidence.⁵

Many States have, of late years, authorized private corporations to administer estates of deceased persons, and assume the guardianship of the persons and estates of minors, and of persons of unsound mind. There was no such authority at common law,⁶ and it was negatived in several of the United States;⁷ but in modern times the current of public opinion has settled strongly in favor of trust companies, organized for the especial purpose of acting as trustees, executors, administrators, guardians, curators, committees, conservators, &c., and of insuring the fidelity of public officers and private employees, giving bonds for them, &c.⁸

Corporations as guardians.

In North Carolina, the clerk of the court having jurisdiction in

¹ Heckman v. Adams, 50 Oh. St. 303, 313.

² Rev. St. 1889, § 5517.

³ Easley v. Bone, 39 Mo. App. 388.

⁴ Voorh. Rev. Code, 1888, Art. 413; Interdiction of Bothick, 43 La. An. 547, explaining that the curatorship by the wife is *dative*, being conferred by the court on the recommendation of the family meeting, while that of the husband over his wife is *legal*, being his of course, or of right.

⁵ Raymond v. Wyman, 18 Me. 385.

⁶ See, on the incapacity of corpora-

tions to act as executors or administrators at common law, Woerner on Administration, § 233, p. 509, citing English authorities.

⁷ President of Georgetown College v. Browne, 34 Md. 450; Thompson's Estate, 33 Barb. 334, and see Kirkpatrick's Will, 22 N.J. Eq. 463, 467.

⁸ See a discussion in vindication of such acts, and of their constitutionality, by Mitchell, J., delivering the opinion of the court in Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7.

lunacy is required to act as guardian for insane persons or inebriates, if no other person will qualify.¹

§ 134. **Guardianship of Non-Residents of Unsound Mind.** — The jurisdiction of guardians in lunacy is of strictly territorial limitation. The courts of one country or State cannot affect or charge property in another country or State; but application must be made to the tribunals, or at least under the law, of the place where the property is situated.² So that, if no commission could issue in the jurisdiction of the estate, the owner being non-resident, no lawfully appointed care-taker of the estate could be secured.³ The appointment of a committee gives him no standing in the courts of another State,⁴ but the foreign committee may, by statutory authorization, be appointed committee in such other State.⁵

Jurisdiction over lunatics extends over the territory.

While a committee of the person cannot be appointed to a lunatic resident abroad,⁶ yet a commission may issue in the case of one temporarily present in the State.⁷ But the power of chancery courts, in the absence of statutory provisions on the subject, to institute proceedings *de lunatico inquirendo* in the case of non-resident persons of unsound mind, and to appoint guardians to them after inquisition, is well established in England and America, provided that such person has real or personal estate within the jurisdiction of the court.⁸ The inquisition taken in one country under a commission issued there, finding a person of unsound mind, is not sufficient for the appointment of a guardian in another country or State;⁹ and the

No committee can be appointed of the person of a non-resident,

but a committee may be appointed to administer a non-resident's property.

¹ Code, 1883, § 1676.

² *Allison v. Campbell*, 1 Dev. & B. Ch. 152; *Matter of Chandois*, 1 Sch. & Lef. 301; *Rogers v. McLean*, 31 Barb. 304.

³ *In re Devausney*, 52 N. J. Eq. 502, 506. It is held in Louisiana, that the courts of this State have no jurisdiction over the person of an insane person domiciled in another State, and must treat him as a sane person until the courts of his domicil have interdicted him: *Hansell v. Hansell*, 44 La. An. 548, 551.

⁴ *Weller v. Suggett*, 3 Redf. 249; *Matter of Neally*, 26 How. Pr. 402; *Rogers v. McLean*, 34 N. Y. 536, 545.

⁵ Bliss, Code (N. Y.), § 2326.

⁶ *In re B* —, 1 Irish Eq. 181.

⁷ *Matter of Houstoun*, 1 Russ. Ch. 312; *Matter of Colah*, 3 Daly, 529, 535, citing *Bariatinsky's Case*, 1 Phil. 375; and other authorities.

⁸ *Matter of Perkins*, 2 Johns. Ch. 124, relying on *Southcot*, *ex parte*, 2 Ves. Sr. 401; *In re Devausney*, 52 N. J. Eq. 502; *Matter of Petit*, 2 Paige, 174; *Matter of Ganse*, 9 Paige, 416 (the lunatic having personal property only); *Matter of Fowler*, 2 Barb. Ch. 305.

⁹ *Matter of Chandois*, 1 Sch. & Lef. 301; *Matter of Houstoun*, 1 Russ. Ch. 312; *Matter of Perkins*, *supra*.

Disability of one having been found incompetent does not follow him into another State,

but a foreign inquest may justify a commission.

In United States Court.

Domicil of insane person is not changed until he acquires a new domicil.

Non compos may change domicil from one county to another by consent of guardian.

disability under which one is placed by having a conservator placed over him, being created wholly by statute, can have no operation where the statute does not operate;¹ hence, a contract made by a person under a conservator in the State of the forum, which is valid under the law of the State of his domicil, where he was not placed under guardianship, is valid in the forum also.²

There must be a commission within, which cannot be executed outside of, the State;³ but a foreign inquisition may be sufficient ground of evidence to warrant a commission.⁴ In the District of Columbia, the United States Circuit Court appointed a committee to one found lunatic in Maryland, citing for authority two English cases,⁵ and stating that the reason why, in New York, a foreign inquisition is not sufficient for the appointment of a committee, is, that the statute only authorizes the Chancellor to appoint a committee for those who should be found lunatic by that court.⁶

The domicil of an insane person is not changed, although he may absent himself therefrom, until he has acquired a new domicil.⁷ It has been held that a person, pending proceedings for the appointment of a guardian over him, and who was in consequence of such proceedings placed under guardianship as an insane person, may have sufficient mental capacity to change his domicil, and to acquire a new domicil in another State, if his guardian assent thereto, so as to give jurisdiction to the courts of that State for the original probate of his will; and that such change of domicil does not deprive the Probate Court having appointed his guardian of its jurisdiction over him.⁸ It is also held, that the domicil of a person *non compos mentis* under guardianship may be changed (from one county to another in the same State) by the direction or

¹ *Gates v. Bingham*, 49 Conn. 275, 278.

² *Gates v. Bingham*, *supra*.

³ *Southcot, ex parte*, 2 Ves. Sen. 401; *Matter of Petit*, 2 Paige, 174.

⁴ *Gillam, ex parte*, 2 Ves. Jr. 587; *Matter of Perkins*, 2 Johns. Ch. 124; *In re Devausney*, *supra*.

⁵ *Ex parte Lewis*, 1 Ves. Sen. 298, and *ex parte Gillam*, 2 Ves. Jr. 587.

⁶ *Burke v. Wheaton*, 3 Cr. Cir. Ct. 341; *In re Newport*, 2 My. & Cr. 43, note; *In re Knox*, 2 My. & Cr. 43, note.

⁷ *Matter of Ganse*, 9 Paige, 416.

⁸ *Talbot v. Chamberlain*, 149 Mass. 57.

with the assent of his guardian, express or implied.¹ The same doctrine was announced in Connecticut.²

In the absence of statutory provisions on the subject, the power of chancery courts to authorize the removal of a lunatic's property to another State is questionable;³ but it has been exercised in analogy with the generally admitted doctrine that courts of chancery are authorized to transfer funds from the forum of ancillary administration to the domiciliar administrator without the aid of a statute, and under the safeguards provided by statute for the removal of infants' estates.⁴ So, too, it is held, that although the court had not the power to order the removal of an idiot's property, yet it could make an annual allowance for his support, and direct the guardian to pay it over to the guardian in the State in which the ward resides.⁵ But probate courts seem to have no power to order the removal of a lunatic's property to another State without a statutory grant.

It is doubtful whether chancery has authority, without a statute, to authorize removal of property.

The power has been exercised in analogy.

Chancery power over infants' estates.

Courts may make allowance for non-resident's support.

In probate and other courts having statutory jurisdiction over persons of unsound mind, their powers over non-residents is to be deduced, of course, from the statutory provisions on the subject. In Alabama, for instance, the statute authorizes the appointment of guardians to non-resident persons of unsound mind, on proof that they were declared such by a court of competent jurisdiction in the State of the incompetent's domicile.⁶ A similar provision exists in Indiana.⁷ So in New Jersey, after notice, published as may be directed by the court, not less than thirty nor more than sixty days, to show cause, if any there be, why such appointment should not be made.⁸ In Connecticut, conservators may be appointed to non-resident lunatics, on the application of any relative, or of his committee, conservator, or guardian appointed by the court of his domicile, for the purpose of selling such lunatic's real estate, by the

Statutes allowing appointment of guardians to non-resident lunatics in Alabama,

Indiana, New Jersey,

Connecticut,

¹ *Anderson v. Anderson*, 42 Vt. 350; *Holyoke v. Haskins*, 5 Pick. 20, 26; and see *McNeely v. Jamison*, 2 Jones Eq. 186, 187.

² *Culver's Appeal*, 48 Conn. 165, 171.

³ *McNeely v. Jamison*, 2 Jones Eq. 186.

⁴ *Clanton v. Wright*, 2 Tenn. Ch. 342.

⁵ *McNeely v. Jamison*, *supra*.

⁶ Code, 1886, § 2402.

⁷ Ann. St. 1894, § 2719.

⁸ Rev. 1877, p. 601, § 2.

Kansas, Probate Court of the county in which the land lies.¹
 Illinois, And similarly in Kansas.² In Illinois the non-resident guardian of a non-resident lunatic may maintain suits for real or personal property and sell the same, on proof that such sale has been authorized by the court having jurisdiction over such lunatic in the State of his domicil;³ and so in Ohio, on further proof, that the lunacy continues, and that such guardian has given sufficient bond.⁴ A similar provision exists in Louisiana.⁵ In Missouri, the same proceedings must be had against an alleged non-resident person of unsound mind as against a resident, before a guardian can be appointed, except that no provision is made for notice;⁶ but real estate of non-residents of unsound mind may be sold under the same conditions as real estate of non-resident minors.⁷ It is also held in this State, that a foreign guardian of a foreign insane ward may have an agent in this State to receive money due to such ward; and payment to such agent will discharge a debtor *pro tanto*.⁸ In some of the States foreign trustees of insane persons have the same powers as if appointed in such State, on filing proof of appointment and of having given bond: for instance, in Delaware.⁹

Provision is also made for notice to non-resident lunatics, before they are proceeded against in court. In Ohio, the provisions

Notice to non-residents required. made by statute to bring non-resident defendants into court is held to apply equally to sane and insane persons.¹⁰

Appointment of guardian in State of his domicil, and subsequently in another State, makes the latter auxiliary to the former, and the guardian accounts in the former.

The appointment of a committee to a lunatic in the State of his residence, who has property in another State, where the same committee is subsequently appointed as guardian to the same lunatic, makes the second appointment auxiliary to the previous appointment, in the forum of which the committee or guardian is liable to account. Such accounting must

¹ Gen. St. 1887, § 480.

² Gen. St. 1889, § 3704.

³ Wing v. Dodge, 80 Ill. 564, 567; Rev. St. 1889, ch. 86, § 41.

⁴ Rev. St. 1890, § 6315.

⁵ Interdiction of Parker, 39 La. An. 333; Vick v. Valz, 47 La. An. 42.

⁶ Rev. St. 1889, § 5559.

⁷ Rev. St. 1889, § 5538. As to the sale of the real estate of non-resident minors, see *ante*, Title III.

⁸ Ferneau v. Whitford, 39 Mo. App. 311, 316.

⁹ Rev. C. 1874, ch. xlix. § 7.

¹⁰ Sturges v. Longworth, 1 Oh. St. 544, 549.

be made on the settlement of his guardianship, and cannot be collaterally questioned.¹

§ 135. **Validity of the Appointment of Guardians to Persons of Unsound Mind.** — It appears from the consideration of the subject of notice to parties proceeded against in chancery or probate courts for the purpose of placing them under guardianship,² that the institution of such a proceeding without notice to the party to be affected thereby, is a mere nullity in most States. It follows, self-evidently, that the appointment of a guardian in such case is likewise a nullity.³ A broad distinction was formerly made with respect to the validity or collateral conclusiveness of their judgments and decrees between courts of record proceeding according to the common law, and probate or other courts upon which special jurisdiction is conferred, by statute or constitution, for a limited purpose. The latter class of courts were, notably in some of the Eastern States, relegated to the class of tribunals authorized to exercise certain powers and functions under particular enumerated circumstances, and in the manner specifically pointed out by the statute creating them. It was held indispensable to the valid exercise of their powers that the circumstances conferring the jurisdiction existed at the time, and that the course of their proceedings was in the exact manner prescribed, all of which must affirmatively appear by their record; and although they do so appear, this is only *prima facie* proof, which may be rebutted collaterally, and by parol evidence.⁴ If in such States the statute limit the jurisdiction of the Probate Court to appoint a conservator to the actual residents of the probate district, and requires notice to be served on him personally, or left at his place of actual abode, the appointment of a conservator over a person domiciled in the district, but whose actual residence was, at the time of the service of the notice, in another State, in which no notice was served on him, is void; and its invalidity may be shown in a collateral proceeding and by parol testi-

Guardianship is void, if proceedings in lunacy are void.

Validity of judgments of courts proceeding according to common law, as against the judgments of courts of special jurisdiction,

in which latter case the facts conferring jurisdiction must appear of record and may be rebutted.

If any statutory requirement be omitted, all subsequent proceedings are void.

¹ Commonwealth v. Rhoads, 37 Pa. St. 60, 63.

² Ante, §§ 119, 121.

³ Molton v. Henderson, 62 Ala. 426; Arrington v. Arrington, 32 Ark. 674.

⁴ Sears v. Terry, 26 Conn. 273.

mony.¹ So it was held in Wisconsin, that if the petition for a writ *de lunatico inquirendo* was not verified as required by statute, the court does not obtain jurisdiction, and all subsequent proceedings are void. The requirements of the statute must appear affirmatively of record to have been complied with.²

But the trend of courts is in the direction of recognizing probate and other courts having probate jurisdiction as courts of

Current of decisions now is in the direction of placing courts of testamentary jurisdiction on the level of courts of common law jurisdiction.

record (there are but few, if any, States in which they are not now designated as such by the statutes creating them), whose jurisdiction, within the sphere of the powers conferred upon them, is general, exclusive, and original; and their actions, within their jurisdiction, are as binding and conclusive in all collateral proceedings, as those of any other courts of record.³

Thus it is held that the proceedings of probate courts in appointing guardians to insane persons are not void, however irregular or

Their judgments appointing guardians to insane persons are not collaterally assailable.

erroneous, if the court have jurisdiction of the subject-matter; hence, want of notice renders their proceedings voidable by the parties injured, but not void; defects of form in the precept or return of an inquisition do not render them mere nullities, if the sanity of

the party is made the subject of inquiry and a distinct return is made as to that point.⁴ Letters of guardianship to a lunatic, issued by a court having power to appoint such guardians, cannot be collaterally questioned.⁵ In Illinois, if the record shows, or the court

¹ *Sears v. Terry*, *supra*; to same effect: *Holyoke v. Haskins*, 5 Pickering, 20.

² *Appeal of Royston*, 53 Wis. 612, 617. Nor does an appellate court obtain jurisdiction by appeal in such case: *Ib.* See as to the effect of appeal, *post*, § 157.

³ *Johnson v. Beasley*, 65 Mo. 250, 256 *et seq.*, in which case Judge Henry takes a comprehensive view of the authorities *pro* and *con*, reaching the conclusion stated in the text. See also *Sheldon v. Newton*, 3 Oh. St. 494, showing that the distinction between courts whose judgments are, and those whose judgments are not, conclusive and collaterally unimpeachable, is not that between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to decide on their own jurisdiction, and to exercise it

to a final judgment without setting forth the facts and evidence on which it is rendered, and whose records, when made, import absolute verity; and those of an inferior grade, whose decisions are not of themselves evidence, and whose judgments can be looked through for the facts and evidence which are necessary to sustain them. See, on the subject of the conclusiveness of judgments of probate courts, *Woerner on Adm.* § 143; also § 145.

⁴ *Kimball v. Fisk*, 39 N. H. 110. To same effect: *Gates v. Carpenter*, 43 Iowa, 152, 154; *Ockenden v. Barnes*, 43 Iowa, 615, 616; *State v. Hyde*, 29 Conn. 564, 568.

⁵ *Warner v. Wilson*, 4 Cal. 310, 313; *Shroyer v. Richmond*, 16 Oh. St. 455 (in case of a minor, but held to be fully applicable to guardians of insane persons in

finds, the jurisdictional facts, the record cannot be contradicted in a collateral proceeding.¹ In South Dakota, jurisdiction will be presumed against collateral attack until a state of facts inconsistent with such presumption is affirmatively shown.²

§ 136. **Bond to be given by Guardians of Persons of Unsound Mind.** — There may be cases in which the circumstances justify a court of chancery to appoint a committee to a lunatic without requiring him to give bond for the faithful performance of his trust, if no one will act as committee who will give the security,³ or, where the property is small and easily secured;⁴ in such cases the appointment has been made without reference to a master in chancery, and annual accounts dispensed with.⁵ And so, by the English Lunacy Regulation Act,⁶ the committee may bring into court an adequate sum in money or stocks, which may be directed by the master to be deposited in the Bank of England to the credit of the lunatic, and accepted as a substitute for the bond with surety. But guardians appointed by courts other than chancery courts, and chancery guardians (or committees, conservators, etc.) generally, are required to give bonds with sufficient sureties, in such penal sums as may be deemed adequate by the court, usually required to be not less than double the amount of the personal property which it is supposed may come into the custody of the guardian, at any time during his term of office. The general nature of such bonds, their sufficiency in technical execution, amount of the penalty, and solvency of the sureties, the reciprocal rights, duties, and liabilities of the principals, sureties, and beneficiaries, as well as the duration and extent of liability of the sureties, are so nearly identical with those of the bonds given by guardians of minors, that it would be useless repetition to go over the same ground with reference to the bonds of guardians of persons of unsound mind. The chapter treating of bonds given for the protection of minors⁷ may be looked upon as applying, *mutatis mutandis*, to bonds given for the protection of persons of unsound mind under guardianship.

Court of Chancery may appoint guardian without bond.

But guardians appointed by other courts, and chancery guardians generally, are required to give bond.

Like bonds of guardians or curators of minors.

Heckman v. Adams, 50 Oh. St. 305, citing, also, earlier Ohio cases; Rogers v. Walker, 6 Pa. St. 371, 373.

¹ Searle v. Galbraith, 73 Ill. 269, 271.

² Matson v. Swenson, 58 N. W. (S. D.) 570.

³ In re Frank, 2 Russ. Ch. 450, 451.

⁴ In re Burroughs, 2 Drury & W. 207.

⁵ Ex parte Pickard, 3 Ven. & B. 127;

Ex parte Farrow, 1 Russ. & M. 112.

⁶ 16 & 17 Vict. ch. 70, § 64.

⁷ Ante. §§ 37-46.

It has been held, that although the appointment of a conservator be void, yet the recital in the bond that the principal has been appointed conservator, would estop the obligors from denying the legality of the appointment;¹ but if the obligation expressed be insensible and uncertain, the bond also is void.²

Surety is estopped from denying validity of his principal's appointment.

The principle, that equivocal expressions or language bearing two constructions will be construed most strongly against the obligor, is held applicable against sureties in a guardian's bond; thus, where a bond is approved by a judge of the same name as one of the sureties, it will be presumed that the surety is a different person from the judge.³

Equivocal expressions in bond to be construed most strictly against obligor.

Bond is good, though filed after conservator's removal,

or when payable to the people, instead of the county.

An action on the conservator's bond may be maintained upon an order to pay over the balance in a conservator's hand to his successor, by one appointed conservator after the removal of such successor, before such balance was paid him;⁴ it is no objection to the recovery on a conservator's bond, that it was filed by the clerk after the conservator's removal.⁵ So, a conservator's bond made payable to the people, instead of the county treasurer as required by statute, is good and valid as a common law obligation, and may be enforced by suit in the name of the people for the use of the proper person.⁶

A bond given by the guardian or committee of a lunatic appointed by a chancery court was held, in South Carolina, not to support an action at law, and the fact that the Chancellor ordered a suit at law to be brought can give no jurisdiction.⁷

Bond given to a Chancery court will not support action at law.

In West Virginia, in a suit against the committee of a lunatic, all the sureties on his official bond must be made parties, if relief is sought against the sureties; and where all are made parties in the summons and bill, and no process has been served upon some of them, it is error to decree against the others, until all have been properly convened before the court.⁸

All sureties must be made parties to hold sureties liable.

¹ Hayden v. Smith, 49 Conn. 83, 84; Parnell v. Calloway, 78 Va. 387, 395.

² Hayden v. Smith, *supra*.

³ Richardson v. Dugger, 85 Ill. 495, 499.

⁴ Richardson v. Dugger, *supra*.

⁵ Delivery to the clerk is sufficient: Richardson v. Dugger, *supra*.

⁶ Richardson v. Dugger, *supra*.

⁷ James v. Wallace, 4 McCord, 121.

⁸ Hedrick v. Hopkins, 8 W. Va. 167, 171.

Where a lunatic was supported by her insolvent committee, who received her estate, but charged her no board, a reasonable charge for which would exhaust her estate; and where such committee made a trust deed to secure, first, the sureties on his bond as committee, and, next, other debts, it was held, in a bill to distribute the fund, that such sureties are entitled to all the means of payment held by creditor against the principal debtor; and creditor has reciprocal rights to all securities which principal debtor may have furnished for surety's indemnity.¹

Sureties of an insolvent committee are entitled to all means of payment held by creditors.

Statutory provisions exist in many States, requiring publication in some newspaper, of the appointment of a guardian.²

¹ *Hanser v. King*, 76 Va. 731.

St. 1889, § 5524; New Hampshire: Publ.

² For instance, in Louisiana: Voorh. St. 1891, ch. 179, § 5; Wyoming: Rev. R. C. C. 1889, Art. 398; Missouri: Rev. St. 1887, § 2289.

TITLE SIXTH.

OF THE FUNCTIONS OF GUARDIANS TO PERSONS OF UNSOUND MIND.

CHAPTER XVII.

OF THE DUTIES AND POWERS OF GUARDIANS TO PERSONS OF UNSOUND MIND.

§ 137. **Nature of the Office of Committee or Guardian to an Insane Person.**—The officers appointed by courts of chancery to take charge of the persons and estates of persons incompetent to manage their own affairs, by whatever name they may be known, are the mere bailiffs or servants of the court, and as such are subject to its orders and directions in everything pertaining to the management of the lunatic's estate, and the maintenance of himself and his family;¹ and as such they cannot be held liable for any error of the court, if error there be in its action.² Not so in regard to guardians appointed by probate or other courts having statutory jurisdiction over persons of unsound mind; these are clothed with powers pointed out by statute, including, generally, a substitution for the insane ward with reference to all his interests, and authority to act for him under the supervising control of the court, in the management of his property, and to fix the locality of his person, and to even determine his domicil.³ "I apprehend it is clear," says Wilde, J.,

Committees or guardians appointed by a chancery court are the mere servants or bailiffs of the court,

and not liable for error of the court.

Guardians appointed by probate courts have authority to act for the ward in the management of his property.

¹ *Shaffer v. List*, 114 Pa. St. 486, 489; *Bolling v. Turner*, 6 Rand. 584; *Petrie v. Shoemaker*, 24 Wend. 85, 86; *Eckstein's Estate*, 1 Pars. Sel. Cas. 59, 65; *Matter of Otis*, 101 N. Y. 580, 583.

² *Halsey's Appeal*, 120 Pa. St. 209, 214.

³ *Anderson v. Anderson*, 42 Vt. 350, 353. But see, as to a guardian's power to change his (minor) ward's domicil, *ante*, § 27.

in *Holyoke v. Haskins*,¹ "that by our laws a guardian has the same power over his ward that a parent has over his child."

The powers, duties, and liabilities of these guardians are fixed by statute in the several States. It is provided, for instance, in Alabama² that trustees of drunkards must superintend the affairs of their estates, and from the avails thereof provide for their and their families' support. And in Arkansas guardians of persons *non compotes mentis* are authorized and required to collect all debts due the ward, and adjust, settle, and pay all debts due by the ward, so far as the estate and effects extend;³ and the court is required to make orders for the ward's restraint, support, and safe-keeping; the management of his estate, and the support and maintenance of his family, and the education of his children; and to set apart and reserve for the use of such family the property, real and personal, not necessary to be sold for payment of debts; and to let, sell, or mortgage any part thereof when necessary.⁴ Similar provisions are made in Michigan,⁵ Missouri,⁶ and probably most other States.

Statutory provisions exist in most States touching the duties of guardians.

In Alabama.

In Arkansas.

Michigan.

Missouri.

A consequence of the difference in the powers of chancery and statutory guardians is seen in this, that the latter are, and the former are not, liable to be sued at law on claims against the lunatic or his estate. No execution can issue against the lunatic's estate under the control of a chancellor; but the Chancellor may, either before or after judgment, direct the debt to be paid out of the estate.⁷

Statutory guardians are, chancery guardians are not, liable to be sued at law on claims against the ward.

The powers, duties, and liabilities of guardians of persons of unsound mind are declared by statute in many of the States to be the same, and to be subject to the same restrictions, as those of guardians of infants,⁸ or of executors and administrators;⁹ and in others they are so held, with or without such a statute.¹⁰

Powers, duties, and liabilities of guardians of persons of unsound mind are same as those of guardians of minors.

¹ 5 Pickering, 20, 26.

² Code, 1886, § 2504.

³ Digest, 1894, § 3830.

⁴ Digest, 1894, § 3831.

⁵ *Lyster's Appeal*, 54 Mich. 325, 327.

⁶ Rev. St. 1889, § 5531.

⁷ *Bolling v. Turner*, *supra*; *Eckstein's Estate*, 1 Pars. Sel. Cas. 59, 65.

⁸ For instance, in Georgia: Code, 1882, § 1853; Idaho: Rev. St. 1887, § 5786; Indiana: Rev. St. 1894, § 2716; Michigan: Howell's St. 1882, § 6321; Missis-

sippi: Ann. Code, 1892, § 2219; Nebraska: Comp. St. 1891, ch. 34, § 16; Nevada: Gen. St. 1885, § 562; Ohio: Rev. St. 1890, §§ 6304, 6311; Texas: Sayles' Civ. St. § 2660; Utah: Comp. L. 1888, § 4319, 4320.

⁹ See, for instance, in Colorado: Mills' St. 1891, §§ 2941, 2947; Kentucky: St. 1894, § 2154; Minnesota: St. 1891, § 5835; Ohio: Rev. St. 1890, § 6314 (as to insolvent estates); Wyoming: Rev. St. 1887, § 2305.

¹⁰ *Alexander v. Alexander*, 8 Ala. 796,

The committee, or guardian, does not become the owner of the ward's property; the title thereto is in no wise changed or diverted from the lunatic by reason of the appointment of a committee or guardian.¹ Hence, the legal ownership of a trustee for the benefit of one who is subsequently found lunatic is not affected by the lunacy proceedings.² If in such case active duties are annexed to the trust, it is evident that the trustee should have the custody and control not only of the *corpus*, but also of the interest or income arising from the trust property, if necessary to carry out the trust.³ But where the trust is for a specific purpose — to prevent alienation by the *cestui que trust*, for instance — the committee is entitled to receive and apply the income.⁴ So, in a suit in equity by the husband, and guardian of an insane woman against her trustee under a marriage settlement, to obtain an order for contribution from the income of the trust property, secured to her sole and separate use, to aid in her support, the court will appoint a guardian *ad litem* for her, before hearing the case; but may order the trustee to pay over to the guardian such portion of the income, to aid in her support, as may be reasonable.⁵

It is made the guardian's duty, in most States by express statutory enactment, to take charge of the person and estate, or if so provided by the appointment, of either the person or the estate; collect all outstanding debts due the ward, pay the debts owing by him, and, generally, to manage his estate to the best advantage.⁶

Where a spendthrift under guardianship would have the election of avoiding or affirming an act done or contract entered into while a

799; *Stumph v. Pfeiffer*, 58 Ind. 472, 475; *Gates v. Carpenter*, 43 Iowa, 152, 154; *Interdiction of Rochon*, 15 La. An. 6; *Succession of Webre*, 36 La. An. 312; *Heckman v. Adams*, 50 Oh. St. 305, 312; *Cathcart v. Sugenhimer*, 18 S. C. 123, 127 (in respect of title to lunatic's property).

¹ *Cathcart v. Sugenhimer*, 18 S. C. 123, 127; *Frost v. Redford*, 54 Mo. App. 345, 351, affirmed, on this point, on appeal: s. c. 30 S. W. (Mo. Supr. Ct.) 179; *Lombard v. Morse*, 155 Mass. 136, 138.

It follows from this principle that the guardian is not personally liable for costs where a defendant is, after the commence-

ment of an action, adjudged insane, and he renders the estate insolvent, and defends the suit: *Sanford v. Phillips*, 68 Me. 431.

² *Rudy's Appeal*, 20 W. N. C. 241; *Canaday v. Hopkins*, 7 Bush, 108, 112; *Matter of Wilson*, 2 Pa. St. 325, 329; *Rodgers v. Ellison*, Meigs, 88, 90.

³ *Rudy's Appeal*, *supra*.

⁴ *Royer v. Meixel*, 19 Pa. St. 240; *Earp's Estate*, 2 Pars. Sel. Cas. 178.

⁵ *Davenport v. Davenport*, 5 Allen, 464.

⁶ *Anderson v. Anderson*, 42 Vt. 350, 353.

minor, his guardian may avoid such act or contract.¹ So the guardian of an insane person may maintain a bill in equity to compel a reconveyance of land conveyed by his ward to indemnify the grantee against loss upon a bond executed by him as part of the same transaction, and conditioned for the payment of debts and legacies given by the will of the ward, the deed, though absolute in form, having been intended by the parties only as a mortgage, the land being necessary for the ward's support, and a surrender of the bond and a release of the obligor's liability upon it being offered.²

Guardian may elect for his ward.

A New York statute authorizing a committee to maintain in his own name any action or special proceeding which the ward might have maintained, is held to apply to actions involving real as well as those involving personal estate, and to authorize the committee to maintain an action for partition of realty in which the lunatic has an interest, without joining the lunatic as a party.³

In Pennsylvania it is held that a committee does not obtain the right to elect for an insane widow not to take under her husband's will, from a statute conferring upon the committee the management of the real and personal estate of the lunatic, with power to apply the income only to the payment of his debts, and the support of himself and his family. The election can be made by the committee only upon leave granted by the court.⁴

Under leave granted by court.

Where a spendthrift has two guardians, it is competent for either one of them to receive payment of a debt due to the ward, of which payment his receipt is *prima facie* evidence.⁵

Payment to one of two guardians is good.

§ 138. **Guardian's Duty to provide for the Comfort and Ease of the Ward and the Support of his Family.** — "The guardian is appointed for the welfare, comfort, and security of the ward," says Ames, J., delivering the opinion of the Supreme Court of Massachusetts, in the case of *May v. May*.⁶ Although the extent of the provision to be made for the ward is largely within the reason-

¹ *Chandler v. Simmons*, 97 Mass. 508; *Somes v. Skinner*, 16 Mass. 348.

² *Warfield v. Fisk*, 136 Mass. 219.

³ *Koepke v. Bradley*, 38 N. Y. Supp. 707.

⁴ *Kennedy v. Johnston*, 65 Pa. St. 451, 455.

⁵ *Raymond v. Wyman*, 18 Me. 385.

⁶ 109 Mass. 252, 256. To same effect: *Fruitt v. Anderson*, 12 Ill. App. 421, 429; *Creagh v. Tunstall*, 98 Ala. 249.

able discretion of the guardian, yet he may be compelled by law to perform this duty, or be removed from the trust; and if he neglects, a stranger may supply the pressing wants of the lunatic, and have the same made a charge against the estate in the hands of the guardian.¹ “It is no part of his [the guardian’s] duty to

Guardian
should secure
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ing to the
interest of
eventual heirs.

diminish the reasonable comforts of his ward, or to prevent him from enjoying such luxuries, or indulging such tastes as would be allowable and proper in the case of a man similarly situated in other respects, but in the full possession of his faculties.” Hence, it is held, both in England and America, that the guardian of a person of unsound mind should, in the management of his estate, attend solely and entirely to the interests of the owner, without looking to the interest of those who, upon his death, may have eventual rights of succession.² “The maintenance of a lunatic is not limited, as an

Expenditures
are not limited
to income.

infant’s is, within the bounds of income. It is not limited except by the fullest comforts of the lunatic. Fancied enjoyments, and even harmless caprice, are to be indulged up to the limits of income, and for solid enjoyments and substantial comfort the court will, if necessary, go beyond the limits of income.”³ So it is held in Pennsylvania, that the committee of a lunatic are bound to treat him in the most humane way, to administer all the comfort and amusement which the nature of the case will admit, and the funds of the lunatic will afford; and, if possible, have him restored to reason by the use of all the means afforded by his estate to accomplish this purpose.⁴

Where the court is satisfied that it is necessary for the benefit of the lunatic to send him abroad, it is competent for the court to order this to be done, and, so far as it has the means, to see that the order is carried out.⁵

Ward may be
sent abroad, if
deemed bene-
ficial to him.

¹ *Creagh v. Tunstall*, *supra*.

² *Oxenden v. Lord Compton*, 2 Ves. Jr. 69, 72; and see other English cases cited in *May v. May*, *supra*.

³ *In re Persse*, 3 Molloy, 94; quoted with approval in *Kendall v. May*, 10 Allen, 59, 67.

⁴ *Earp’s Estate*, 2 Pars. Sel. Cas. 178, 183.

⁵ The fact, that when a committee goes with his charge beyond the jurisdiction of

the court, it has no longer any power or control over either, does not constitute a sufficient objection, if to keep him within its territorial limits would be prejudicial to his health: *Matter of Colah*, 3 Daly, 529. See this case for a learned disquisition on the origin, development, and extent of the powers of chancery courts over persons of unsound mind by Chief Justice Daly, with citation and analysis of many authorities.

A similar rule is observed in Ireland, where leave was given to take the lunatic out of the jurisdiction, but not out of the United Kingdom,¹ and in England, on condition that his committee bring him within the jurisdiction whenever required.²

The support of the lunatic's family is also incumbent on his estate, and it is the duty of the court to appropriate a sufficient amount out of the lunatic's estate to meet all reasonable demands, if the income of the estate is ample for both himself and his family. If the estate is not sufficient to pay the lunatic's debts and maintain him and his wife and infant children, the court will set apart a sufficient sum for such maintenance, before directing any of his property to be applied to the payment of his debts; and no advancement for prior maintenance is chargeable on this fund.³ Nor is the guardian bound to apply the pension from the United States, payable to a person *non compos mentis*, to the payment of the ward's pre-existing debts, or to sell the furniture of his ward, not subject to execution, for the payment of his debts;⁴ but if in the hands of the committee, and not needed for the lunatic's support, the court may order it to be applied in the payment of debts.⁵ So the amount appointed by a testator for the support of a lunatic will not be reduced by reason of the shrinkage of income of the estate.⁶ And although a committee may undoubtedly maintain ejectment to secure possession of the lunatic's real estate as against strangers, yet he cannot bring such action against the lunatic's wife for the purpose of ejecting her and his children from the house he provided for them.⁷ So, if the wife and children of an insane person are in possession of his land before the appointment of the guardian, and raise a crop thereon, they are entitled thereto for their support, and may recover from the guardian in his individual capacity, if he takes possession of and sells the same.⁸

Ward's family is to be supported out of his estate.

If the estate is not sufficient to pay debts and support the family, sufficient sum for maintenance will be set aside, before the debts are to be paid.

Pension not subject to payment of debts,

unless not needed for support.

Guardian cannot eject wife from homestead.

Wife may recover from guardian the crop raised by them.

¹ Matter of Hackett, 3 Ir. Ch. 375.

² Matter of Jones, 1 Phillips, 460.

³ Matter of Latham, 4 Ired. Eq. 231, 235; *Ex parte Hastings*, 14 Ves. 182; *Adams v. Thomas*, 81 N. C. 296.

⁴ Fuller v. Wing, 17 Me. 222.

⁵ Elwyn's Appeal, 67 Pa. St. 367, 369.

⁶ McClosky's Estate, 9 W. N. C. 496.

⁷ Shaffer v. List, 114 Pa. St. 486, 488.

⁸ Hallett v. Hallett, 8 Ind. App. 305, 310.

Where the income from an insane person's property was not sufficient to maintain her, the guardian was authorized by the court to invest all her property in the purchase of an annuity upon her life.¹ When a lunatic's estate has been exhausted, the court will order the committee to turn over the ward to the custody of the overseers of the poor.²

Annuity may be purchased for support of an insane person.

If the estate is insufficient to pay debts and support the family, county may appropriate necessary means.

If the ward's estate be sufficient, court may direct the guardian to make suitable provision for family.

Husband's estate is liable for necessities procured by wife.

And so, if the estate prove insufficient for the payment of the lunatic's debts, and for the support of himself and his family, as well as for the education of his children, statutory provision is made, generally, that the guardian may apply to the County Court, or other authorities, for an appropriation for such purpose.³ But if the guardian has property belonging to the lunatic, and fails to provide his wife and children with such things as are reasonably necessary for their comfort, application therefor may be made to the court under whose authority the guardian is acting, and the court should direct the guardian to make suitable provisions; but the wife has no cause of action against the husband's estate; and the wife may procure the necessities, and the husband's estate is liable therefor.⁴ If the estate is sufficient, it is not the business of the court to arbitrarily interfere and determine who shall constitute the lunatic's family, or what shall be its appointments, where these things have been previously fixed and settled by the lunatic himself at a time when he had the ability and the right to adjust his own affairs; but the court should authorize his committee to expend a sufficient amount of the lunatic's estate to maintain him and his household in the manner he had chosen for himself before his lunacy, if the estate is ample, and such maintenance best adapted for his comfort and ease.⁵

An allowance will be made out of a lunatic's estate for the maintenance of his illegitimate children, but not for their mother.⁶ So for the education of adopted children⁷ and stepchildren.⁸

¹ Hooper, Petitioner, 120 Mass. 102.

² Matter of McFarlan, 2 Johns. Ch. 440.

³ For instance, in Arkansas: Dig. 1894, §§ 3848-3851.

⁴ Hallett v. Hallett, 8 Ind. App. 305, 308.

⁵ Hambleton's Appeal, 102 Pa. St. 50,

53; Matter of Heeney, 2 Barb. Ch. 326, 328; Shaffer v. List, 114 Pa. St. 486, 489.

⁶ *Ex parte* Haycock, 5 Russ. Ch. 154.

⁷ Matter of Heeney, 2 Barb. Ch. 326.

⁸ Matter of Willoughby, 11 Paige, 257, 260.

And an allowance may be made to the immediate relatives of a lunatic, though not such as he would be bound by law to provide for,—not on the principle that they have any interest in the lunatic's property, but because the court will act with reference to the lunatic and for his benefit, as it is probable the lunatic himself would have acted if of sound mind.¹ A pension was allowed in England to an old personal servant obliged to retire from his services to the lunatic on account of age and infirmity.² So a charitable contribution toward the building of a church, and of a schoolhouse, was authorized on the petition of the committee, who was next of kin and heiress at law to the lunatic.³ And the committee may place in the hands of the lunatic, so long as he is capable of judging of the claims of applicants, small sums of money to be disposed of in charity;⁴ and the court may authorize a gift to indigent brothers and sisters, if deemed prudent.⁵

Allowance may be made for maintenance of illegitimate children, but not for their mother.

So for relatives whom the lunatic would have supported if competent.

Pension allowed to an old servant.

Charitable contributions.

Committee may leave small sums to the ward to be disposed of in charity.

Allowances out of a lunatic's estate to the relations, for whose support the lunatic is not bound, were, however, granted with great reluctance in England, Lord Cottenham saying that the practice was one which could not be regarded with too much caution, and that he would never exercise such a jurisdiction without the greatest jealousy and caution.⁶

Gifts to relatives granted with reluctance.

In Illinois, under a statute directing the application of the income and profit of the estate as far as necessary "to the comfort and support of the ward and his family and the education of his children," payments for necessities furnished the adult insane daughter of a lunatic were

Payment for necessities to an adult insane daughter allowed;

¹ *Ex parte* Whitbread, 2 Mer. 97; *In re* Frost, L. R. 5 Ch. App. C. 699; *Matter of* Heeney, *supra*.

² *Matter of* Carysfort, Craig & Phil. 76.

³ *In re* Strickland, L. R. 6 Ch. App. C. 226; *Matter of* Heeney, *supra*.

⁴ *Matter of* Heeney, *supra*.

⁵ *Matter of* Gilbert, 3 Abb. N. C. 222.

⁶ *Matter of* Blair, 1 Myl. & C. 300, 303. His Lordship finally allowed, in this case,

payment out of the lunatic's estate for the better maintenance and support of her next of kin, "as there seemed no probability that the lunatic would recover, or would be capable of greater enjoyments than those which were now afforded her." See also Clarke, *in re*, 2 Phillips, 282, disallowing a small sum asked for the drainage of an estate of which the lunatic was life-tenant, out of the surplus income of the lunatic, which was very considerable.

but not to an adult son, though for necessities to minor children. held proper, and the conservator was allowed credit therefor in his settlement;¹ but payments to an adult son, who took upon himself the care of the family and lived upon and worked his father's farm, though for necessities of the minor children, were held improper.²

In North Carolina the statute makes provisions for fit and proper advancements to children, or the children of deceased children of lunatics, out of the surplus income of their estates, although not entitled to be supported or educated out of such estate, after applying sufficient of the income for abundant and ample support of the lunatic and his family.³ These advancements are made at the discretion of the clerk having jurisdiction over lunatics, for the promotion of the interest of adult or married offspring, or the education and support of minors,⁴ bearing in mind that the advancements are to be so made, that at the death of the lunatic the estate may be distributed equally.⁵ On the application for such advancement, the guardian and all persons who would be distributees must be made parties.⁶ Similar provisions are contained in the statutes of Tennessee.⁷

But where an allowance has been decreed out of the proceeds of sale of a lunatic's real estate for his maintenance, the amount is not to be exceeded without the sanction of the court.⁸ And expenditures for the ward exceeding the revenues of the estate without legal authority from the court cannot be allowed a curator,⁹ unless the court subsequently ratify such expenditures as having been necessary and proper.¹⁰

It is held in Iowa that under the statutes of that State the court can allow no greater sum for the support of a lunatic's family, than the amount that is

¹ Matter of Hall, 19 Ill App. 295, 298.

² Wilcox v. Parker, 23 Ill. App. 429, 431.

³ Code N. C. 1883, § 1677.

⁴ Ib., § 1678.

⁵ Ib., § 1680.

⁶ Ib., § 1679.

⁷ Code, 1884, § 4457; Farmer v. Farmer, 10 Lea, 309.

⁸ Guthrie's Appeal, 16 Pa. St. 321, 326.

⁹ Succession of Webre, 36 La. An. 312, 314; Interdiction of Leech, 45 La. An. 194, 198; Patton v. Thompson, 2 Jones Eq. 411, 412; Kennedy v. Johnston, 65 Pa. St. 451; Hehn v. Hehn, 23 Pa. St. 415.

¹⁰ Frankenfield's Appeal, 102 Pa. St. 589.

exempt from execution, until all the debts are paid.¹ Similarly in Missouri² and Colorado if the estate is insolvent.³

There is no liability at common law of children for the maintenance of their insane parents,⁴ and in Nebraska it is held that the statutes of that State do not impose such liability.⁵ And the father of an indigent adult insane son is not liable for his support, unless such liability is created by statute.⁶

Children not liable for maintenance of insane parents.

Provision is made in most States for the support of insane paupers by the respective towns or counties, and also for the refunding of the amounts expended for them, out of the estates of such persons to such towns or counties. Whether such persons are liable to an action on the part of a town or county for moneys paid on their account in the character of paupers seems doubtful;⁷ but a statute authorizing the directors of the poor to sue for and recover any real or personal property, and to collect and receive the rents and profits of the real estate and to apply the proceeds, or so much thereof as may be necessary, to pay the expenses incurred in the support and funeral of such person, is construed as subjecting an estate acquired by the pauper after he has become a charge on the public to liability for his previous maintenance.⁸ In a suit for the collection of sums paid by the county for the support of an insane person, the certificate of the superintendent of the hospital and notices of the State auditor, though certified recently before the trial and for the purposes of the trial, are competent evidence to prove the amount of the claim.⁹ The guardian of an insane person or spendthrift is bound to see that his ward does not suffer; and if he takes the proper steps to make

Property acquired by an insane pauper is liable for his previous maintenance by the public.

Guardian entitled to reimbursement for money advanced by him for his ward's support.

¹ *Dutch v. Marvin*, 72 Iowa, 663.

² *Frost v. Redford*, 54 Mo. App. 345, 358. But if an order appropriating a certain amount for the support of the ward and his family, and the education of his children is not attacked, it is a sufficient defence to an action against the guardian for breach of duty in not distributing the fund among the ward's creditors, though the court had not the power to make the order; s. c. 30 S. W. (Mo. Sup. Ct.) 179.

³ *Mills' St.* 1891, § 2944.

⁴ See authorities collected by Reese, Ch. J., in *Richardson v. Smith*, 25 Neb. 771.

⁵ *Richardson v. Smith*, 25 Neb. 767.

⁶ *Trustees v. Jacobs*, 6 Houst. 330.

⁷ The contrary is held in *Deer Isle v. Eaton*, 12 Mass. 328; *Stow v. Sawyer*, 3 Allen, 515; *Charlestown v. Hubbard*, 9 N. H. 195; and other cases.

⁸ *Directors v. Nyce*, 161 Pa. St. 82.

⁹ *Cedar County v. Sager*, 57 N. W. (Iowa) 634.

the town liable for the spendthrift's support, and advances money of his own in maintaining such ward, he is entitled to reimbursement from the town.¹

The Orphans' Court in New Jersey is held not to have authority to direct in advance how much a lunatic's guardian shall expend annually for his support out of the personal and the profits of the real estate,² and that a daughter of the lunatic may prosecute a writ of *certiorari* for the purpose of testing the validity of such an order.³

§ 139. **Payment of Debts incurred by Persons of Unsound Mind before Inquisition.** — It is the duty of guardians or committees of

persons of unsound mind to pay the debts of their wards out of their wards' estates. Where lunacy jurisdiction is exercised by courts of chancery, the remedy of creditors is in equity, where they all stand upon

terms of equality, and the estate remaining after setting aside a sufficient sum for the support of the lunatic and his family will be subjected to the payment of their claims — *pro rata*, if insufficient

to pay the debts in full.⁴ In such cases, since the estates of persons under guardianship are in the custody of the law,⁵ creditors have no recourse against

them, except by order of the Chancery Court; creditors may establish their claims by suit at law, but the common-law process to execute the judgment obtained is denied them. On proper application of a committee the Chancellor will restrain the execution, and compel the plaintiff to come before him for justice. It will be a contempt of court to interfere with the property under the exclusive control of the Court of Chancery,⁶ or even to commence a suit at law without permission, after notice of the inquisition declaring the incompetency.⁷

But where the jurisdiction over insane persons is confided to courts of probate, or courts of testamentary jurisdiction, which have no power to establish or compel payment of debts incurred by the lunatic

In New Jersey court has no authority to direct in advance how much guardian may expend annually for ward's support.

Creditors of lunatics are to be paid in equity *pro rata*.

Creditors have no recourse except in chancery.

If guardian is appointed by Probate Court, proceedings to recover claims is

¹ Fiske v. Lincoln, 19 Pickering, 473.

² State v. Berry, 56 N. J. L. 454.

³ State v. Berry, *supra*.

⁴ Wright's Appeal, 8 Pa. St. 57, 60; Williams v. Cameron, 26 Barb. 172; Matter of Heller, 3 Paige, 199, 201; Matter of Otis, 101 N. Y. 580, 583.

⁵ McLean v. Breese, 109 N. C. 564, 566; Wright's Appeal, *supra*.

⁶ Williams v. Cameron, 26 Barb. 172, 174; L'Amoureux v. Crosby, 2 Paige, 422; Robertson v. Lain, 19 Wend. 649, 650.

⁷ L'Amoureux v. Crosby, *supra*.

before the inquisition, the common-law remedy is substantially the same as against a sane person, except that the guardian or committee must be served with notice, so that he may defend; and that if there be no guardian, a guardian *ad litem* must be appointed.¹ It is the guardian's duty to pay such claims as he believes to be just, and in doing so, he may, in the absence of any statutory restriction or fraud, prefer one creditor to another, just as the ward, if sane, might have done, whether the estate is solvent or not.² If the guardian refuse to pay such claim, the creditor may establish it by proceeding at law, and without statutory authorization the Probate Court has no power to interpose between a creditor having obtained judgment against the ward and its satisfaction out of the ward's property.³ But in such case, and where the guardian admits the debt, the jurisdiction of probate courts arises to authorize the payment of such judgments and debts out of the personal property of the ward, if sufficient, and if not, then, on a proper proceeding, to order the sale of real estate for such purpose.⁴

same as against sane persons ;

but guardian must be notified.

Guardian may pay claims he deems just ; and may prefer creditors ;

Probate Court has no power to interfere,

but, on a proper showing, may order the sale of real estate to pay them.

It is thus seen, that the appointment of a guardian to a person of unsound mind does not prevent his creditors from commencing suits, in such States, to recover their debts ;⁵ and judgment against one declared a lunatic is not void, though voidable, and a purchaser at sheriff's sale, under such judgment will be protected.⁶ In Kentucky a judgment obtained against one subsequently found to be of unsound mind may be revived in an action against him and his committee, but cannot be satisfied by execution after the defendant was found of unsound mind.⁷ In Massachusetts, where a debtor may still be arrested under execution, if the judgment creditor make affidavit that the debtor holds property not exempt from execution, which he does

Appointment of guardian does not prevent suit at law.

In Kentucky.

In Massachusetts.

¹ As to guardians *ad litem* for insane defendants, see *post*, § 145.

² *Frost v. Redford*, 30 S. W. (Mo.) 179.

³ *Adriance v. Brooke*, 13 Tex. 279, 285.

⁴ *Blake v. Respass*, 77 N. C. 193 ;

Smith v. Pipkin, 79 N. C. 569 ; *McLean v. Breese*, 109 N. C. 564, 566.

⁵ *Aldrich v. Clark*, 12 Vt. 413, 418 ; *Morgan v. Hoyt*, 69 Ill. 489 ; *Ex parte Leighton*, 14 Mass. 207 ; *Thatcher v. Dinmore*, 5 Mass. 299.

⁶ *Foster v. Jones*, 23 Ga. 168, 170.

⁷ *McNees v. Thompson*, 5 Bush, 686.

not intend to apply to the payment of the creditor's claim, it is held that a spendthrift under guardianship cannot be lawfully arrested under such charge, because the lunatic's property is not under his control;¹ but that the creditor has a remedy on the guardian's bond.²

Although the court will not order debts incurred by the party before his lunacy to be paid, if such payment will deprive him or his family of maintenance, yet where it appears in the settlement of the guardian's account after the lunatic's death, his only child being of age, that he has in good faith paid such debts without prejudice to the estate, the disbursement will be allowed.³ So, although it is the province of the executor and not of the curator, after the interdict's death, to pay the remaining debts, yet if they were justly due, and their payment discharges the debts, it would serve no useful purpose to disallow them in the curator's account, and to require their payment to the executor, in order that they may be carried into the administration account; and such payments will be allowed the curator if no one is prejudiced thereby.⁴

The personal estate of a lunatic is primarily liable for his debts and for his support; and the Chancery Court has no power to order the sale of real estate, unless it be necessary to raise funds, in the absence of personal property, for the payment of debts, or the maintenance of him or his family, or for the education of his children.⁵ Nor will any provision be made for the support of a lunatic resident in another State, until it appears that the property in the hands of his committee in such other State has been exhausted.⁶

¹ Conant v. Kendall, 21 Pick. 36, 39, approved and followed in Blake's Case, 106 Mass. 501.

² Conant v. Kendall, *supra*.

³ McLean v. Breece, 113 N. C. 390.

⁴ Interdiction of Onorato, 46 La. An. 73, 77.

⁵ Matter of Pettit, 2 Paige, 596; Matter of Hoag, 7 Paige, 312, 315.

⁶ Matter of Taylor, 9 Paige, 611, 619.

Guardian is allowed credit for debts paid in good faith, where no one's interest is affected.

Personal estate is liable for the lunatic's debts; real estate will not be ordered sold unless the personalty is exhausted.

CHAPTER XVIII.

OF ACTIONS BY AND AGAINST PERSONS OF UNSOUND MIND.

§ 140. **Suits against Lunatics for Debts incurred before Inquisition.**—Insane persons are liable to be sued for their debts, accrued before the appointment of a committee, at common law; nor does the appointment of a committee arrest the progress of the action;¹ and no action at law or in equity can be maintained, under the common law, against the committee, because he is the mere bailiff or curator, having no authority to bind the lunatic by contract.² The earlier authorities draw a distinction in the mode of conducting a suit or defence between the case of an idiot, and that of a lunatic; the former must appear in his proper person, and any one may be admitted to prosecute or defend for him, while a lunatic, or one *non compos mentis*, must appear by guardian, if a minor, and by attorney, if of full age.³ Judgment obtained against a lunatic at law cannot be set aside in equity on the mere ground of lunacy when it was rendered,⁴ unless there be some provision of statute contravening the remedy at law.⁵ Thus a judgment by

Lunatics are liable at common law to be sued.

Committee is not liable.

Idiot must sue in person, but lunatic by guardian or attorney.

Judgment against a lunatic is valid.

¹ *Coombs v. Janvier*, 31 N. J. L. 240, 243; *Ex parte Leighton*, 14 Mass. 207; *Van Horn v. Hann*, 39 N. J. L. 207, 208, citing *Broom on Parties*, 182, *Dicey on Parties*, 2; *Allison v. Taylor*, 6 Dana, 87; *Walker v. Clay*, 21 Ala. 797, 807.

² See *ante*, § 137; *Bolling v. Turner*, 6 Rand. 584, 586; *Rodgers v. Ellison*, Meigs, 88, 90; *Justice v. Ott*, 87 Cal. 530, 531; *Brown v. Chase* (case of a spendthrift), 4 Mass. 436; *Raymond v. Sawyer*, 37 Me. 406; *Coombs v. Janvier*, 31 N. J. L. 240; *Steel v. Young*, 4 Watts, 459 (case of trustee of a drunkard); *Bentley v. Torbert*, 68 Iowa, 122; *Holdom v. James*, 50 Ill. App. 376.

³ *Lang v. Whidden*, 2 N. H. 435, citing

English authorities, 436; *Cameron v. Pottinger*, 3 Bibb, 11; *Stigers v. Brent*, 50 Md. 214, 223; *Amos v. Taylor*, 2 Brev. 20; *Buchanan v. Root*, 2 Mon. 114; *Faulkner v. McClure*, 18 Johns. 134; *Ex parte Northington*, 37 Ala. 496, 499; *King v. Robinson*, 33 Me. 114, 122.

⁴ *Stigers v. Brent*, 50 Md. 214, 220; *Tomlinson v. Devore*, 1 Gill, 345; *Pollock v. Horn*, 43 P. (Wash.) 885, holding that judgment against an insane surety, on an attachment bond, who was sane when the bond was executed, is valid.

⁵ *Tomlinson v. Devore*, *supra*; *Brasher v. Cortlandt*, 2 Johns. Ch. 400, 402; *Eckstein's Estate*, 1 Pars. Sel. Cas. 59, 64; *Ex parte Heller*, 3 Paige, 199.

Judgment
against an in-
sane garnishee
may be set
aside.

A judgment
against an
insane person
is not void; but
may be opened
up to let in a
valid defence.

default against a garnishee may be set aside when it appears that the garnishee was insane when the summons was served on her, under a statute authorizing the court to relieve a party from a judgment against him through his mistake, surprise, or excusable neglect.¹ But a judgment or decree against an insane person is not void. If attacked within the proper time after the removal of the disability, the decree may be opened up to admit of a valid defence, which must be set out.² If no guardian has been appointed, the suit must, in the nature of things, be against him whose estate is liable to pay the judgment that may be recovered.³

It was decided in Maine, that when the court receives information from some proper source, that a defendant was not of sound mind when the suit was commenced, it is discretionary with the court to appoint a guardian *ad litem* or not, according to its judgment on the proof presented; and that the law does not impose upon the plaintiff the duty to ascertain the mental capacity of a defendant and make it known to the court, in order that it may appoint a guardian *ad litem*.⁴ But this view is criticised in a later Maine case, holding that reason and justice and safety impose the duty upon the plaintiff to suggest the insanity of a defendant; and that if he omit to do so, he takes the judgment at his peril.⁵ And in New Hampshire the fact that a person against whom a suit is commenced is, at the service of the process, a person of unsound mind, and that he so continued until judgment rendered, and that he appeared in person, or by attorney, or not at all, is good cause to reverse the judgment; but the defect in the proceedings renders them voidable, not void.⁶

Guardian of
lunatic is gen-
erally joined
with him, and
answers for
him,

If the lunatic or person of unsound mind has been put under guardianship, it is, in most States, provided by statute that the committee or guardian be joined as defendant in a suit against the ward; and it is usually required that the committee or guardian answer for

¹ Bond v. Neuschwander, 86 Wis. 391.

² White v. Hinton, 3 Wyo. 753, 763; to similar effect: Pollock v. Horn, 43 P. (Wash.) 885.

³ Ex parte Northington, 37 Ala. 496, 499.

⁴ King v. Robinson, 33 Me. 114, 123.

⁵ Leach v. Marsh, 47 Me. 548, 554.

⁶ Lamprey v. Nudd, 29 N. H. 299, 303. To similar effect: Robertson v. Lain, 19 Wend. 649, 650; Withrow v. Smithson, 37 W. Va. 757.

him.¹ If the guardian or committee be personally interested in the suit, a guardian *ad litem* must be appointed.² So it is the practice in equity, adopted as a rule of law by statute in some States, that the court cannot proceed without the intervention of a guardian to protect the interests of an insane defendant; if he had been judicially declared insane, his committee or guardian is required to conduct his defence; but the court, if for any reason it is deemed best for his interest, may appoint some other competent person to protect his interest as guardian *ad litem*.³ The lunatic must be served with notice of the suit, though formal service of process upon a person deprived of reason may appear somewhat absurd; yet it is necessary that he be a party, so that execution may eventually issue against his estate, and service upon him is necessary.⁴

unless personally interested.

Court cannot proceed without guardian to protect insane person.

Lunatic must be served with notice.

In America the enforcement of the liabilities of persons of unsound mind, incurred before inquisition, is in most States regulated by statute. Thus, for instance, such claims are provable against the estates of lunatics in the hands of their committees or guardians, and payable, in like manner as claims against the estates of deceased persons, in Colorado,⁵ Iowa,⁶ Kentucky,⁷ Maine,⁸ New Hampshire,⁹ and Wyoming.¹⁰ In the absence of statutory authority, however, the Probate Court, or court having probate jurisdiction, has no power to allow claims against the estates of insane persons, in the hands of their conservators or guardians. Such an allowance is a mere nullity, and imposes no duty on the guardian to pay the same.¹¹ In Kentucky the statute authorizes the Circuit or

Probate Court has no power to allow claims unless authorized by statute.

In Kentucky.

¹ Aldridge v. Montgomery, 9 Ind. 302; Symmes v. Major, 21 Ind. 443.

² Hewitt's Case, 3 Bland Ch. 184.

³ Cox v. Gress, 51 Ark. 224, 229; Ryder v. Topping, 15 Ill. App. 216, 220.

⁴ Rodgers v. Ellison, Meigs, 88, 90; Scott v. Winningham, 79 Ga. 492; Harrison v. Rowan, 4 Wash. C. C. 202, 207; Ingersoll v. Harrison, 48 Mich. 234; Justice v. Ott, 87 Cal. 530.

⁵ Mills' St. 1891, § 2941.

⁶ If estate be insolvent: McClain's Ann. Code, § 3469.

⁷ St. 1894, § 2154.

⁸ Rev. St. 1883, ch. 67, § 16.

⁹ Publ. St. 1891, ch. 197, § 8.

¹⁰ Rev. St. 1887, § 2305.

¹¹ Morgan v. Hoyt, 69 Ill. 489. The remedy pointed out in this case for the creditor is the establishment of his claim in a court of competent jurisdiction; whereupon all the property of the insane person might be sold to satisfy the judgment.

Chancery Court to order the sale of all the estate of a lunatic, if the same be not sufficient to pay his debts, and the distribution of the proceeds and settlement of the estate as prescribed by law for the settlement of the estates of insolvent decedents.¹ If pending an action in a court of general jurisdiction the defendant is placed under guardianship in such a State, and the estate is decreed to be settled in the insolvent course, the action abates.² Whenever it appears to the court that a party who has been summoned as defendant to an action is insane, but has not been judicially declared so, or if he has no committee, it is the duty of the court to appoint a guardian *ad litem* for him,³ who is under the control of the court.⁴

After the finding of an inquisition out of chancery declaring the incompetency of the lunatic, the proper remedy of creditors is by an application to the Chancery Court by petition, for the payment of their debts, if the committee decline to pay without direction of the court; and if there be a doubt or denial of the validity of the claims, the court will refer the matter to a master for trial.⁵ Where it is necessary for the

Lunatic or drunkard joined with committee. creditor of a lunatic or habitual drunkard to file a bill against the committee to establish a debt and obtain satisfaction thereof out of the lunatic's estate, it seems that the lunatic or drunkard may also be made a party defendant, so as to bind him by the proceeding; but he is not a necessary party for any other purpose.⁶

Service of the writ for the commencement of an action against a person found to be a lunatic or habitual drunkard must, as is generally provided by statute in the several States, be on the committee or guardian of the estate or person; and before the writ issues, there should be a suggestion of record of the inquisition of lunacy and of the name of the committee, otherwise the service of the writ, though made on the committee, is void.⁷

¹ *German Bank v. Engels*, 14 Bush, 708, 710.

² *Jones v. Jones*, 45 N. H. 123; *Hawkins v. Learned*, 54 N. H. 333.

³ *Gerster v. Hilbert*, 38 Wis. 609, 612, *Speak v. Metcalf*, 2 Tenn. Ch. 214; *Steifel v. Clark*, 9 Baxt. 466, 469.

⁴ Such defendant is treated as a ward

of the court: *Austin v. Bean*, 101 Ala. 133, 147.

⁵ *L'Amoureux v. Crosby*, 2 Paige, 422, 428; *Carter v. Beckwith*, 128 N. Y. 312, 316; *Tally v. Tally*, 2 Dev. & B. Eq. 385, 388.

⁶ *Beach v. Bradley*, 8 Paige, 146, 149.

⁷ *Hulings v. Laird*, 21 Pa. St. 265.

On principle, where the idiocy of the defendant is known, the practice is said to be to stay proceedings until the guardian is notified to appear, and if he chooses to defend, he should enter his name on the record for that purpose.¹

A distinction has been taken between guardians *ad litem* and the general guardians of lunatics with respect to their power to bind the ward by their admissions, pleading, or conducting the trial: while it is admitted that the former can waive nothing and admit nothing, either by answer or otherwise, during the progress of the trial,² it was held in Missouri that the general guardian of an insane person can act in regard to his ward's interest like an ordinary litigant, and waive objections to the admission of testimony, the same as if acting in his own right.³ In Illinois this doctrine is emphatically repudiated.⁴

Guardian *ad litem* cannot bind ward by pleading;

but general guardians sometimes may.

It has been held, that the guardian of an insane person may submit the claims of his ward to arbitration,⁵ which on principle would seem to apply with equal force to claims against his ward; but clearly he cannot submit to arbitration where his interest is adverse.⁶

Submission of claims to arbitration.

So, in North Carolina, under the statute of that State, judgment may be rendered against a person *non compos mentis* on the confession of his guardian.⁷

The promise of a spendthrift under guardianship to pay a debt is not sufficient to sustain an action against him; but an admission, after suit, of a promise made before the suit, has been held sufficient.⁸

Spendthrift's promise to pay a debt not binding.

§ 141. *Liability of Lunatics under Guardianship.* — It is a well-known self-evident rule of law, though not without exceptions in some States, that a lunatic, whose lunacy has been judicially determined, and for whom a committee has been appointed, is incapable of entering into a con-

Contract of a lunatic under guardianship is void.

¹ Per Woodbury, J., deciding *Lang v. Whidden*, 2 N. H. 435, 437, and citing authorities.

² As to the power of guardians to bind their infant wards, see *ante*, § 57; also, as to guardians *ad litem*, § 21.

³ *Collins v. Trotter*, 81 Mo. 275, 283 (Judge Sherwood dissenting, Judge Ray not sitting, and Judge Hough concurring in result, but apparently dissenting from the reasoning, so that the point received the unqualified approval of but two of the

five judges. But the case is cited as sustaining a cognate point in *Le Bourgeoise v. McNamarra*, 82 Mo. 189, 192).

⁴ *Huling v. Huling*, 32 Ill. App. 519, 521, citing earlier Illinois cases, passing on the rights of infants.

⁵ *Hutchins v. Johnson*, 12 Conn. 376.

⁶ *Fortune v. Killebrew*, 86 Tex. 172, 174.

⁷ *McAden v. Hooker*, 74 N. C. 24, 28.

⁸ *Hoit v. Underhill*, 10 N. H. 220, 222.

tract, and that any contract which he may assume to make while in such condition is absolutely void.¹ And the court will not

Lunacy once established presumed to continue. inquire whether the lunacy in fact continued and existed when the contract was made; the presumption of its continuance is conclusive as to all dealings after the inquisition until it has been superseded.² So the incapacity of a drunkard found by inquisition to be incapable of managing his affairs, continues, even during his sober intervals, until the drunkard's death, or the *supersedeas* of the commission.³

But while an adult person of unsound mind cannot be held liable for any express contract entered into by him, it is clear on

Lunatics are liable for necessities. principle and authority that such person may become liable on an implied contract for necessities suitable to his estate and condition in life,⁴ furnished before or

after the appointment.⁵ The ancient maxim, that no one ought

Rule preventing self-stultification. to be permitted to stultify himself, though denied in modern law, is clearly applicable in cases of lunatics, where the law implies, as it does in cases of minors,⁶

a promise to pay for necessary services, or supplying necessary articles,⁷ if not supplied by the guardian.⁸ Insane persons stand, in this respect, on the same footing with minors.⁹ The services

Liability for necessities only if beneficial to them. rendered, or articles furnished, must be such as to prove beneficial to the lunatic; if they prove of no benefit, the party cannot recover, even though he in

good faith supposed him to be sane, if the circumstances known to the other were such as to convince a reasonable and prudent man of his insanity, or put him on an inquiry by which, if reasonably prudent, he might have learned that fact.¹⁰ Whether household

¹ *Carter v. Beckwith*, 128 N. Y. 312, 316; *L'Amoureux v. Crosby*, 2 Paige, 422, 427.

² *Redden v. Baker*, 86 Ind. 191; *Devin v. Scott*, 34 Ind. 67.

³ *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 391.

⁴ *Ex parte Northington*, 37 Ala. 496, 498; *Litchfield's Appeal*, 28 Conn. 128, 137; *Combs v. Beatty*, 3 Bush, 613, 616; *Blaisdell v. Holmes*, 48 Vt. 492; *McCrislis v. Bartlett*, 8 N. H. 569, 571; *Fruitt v. Anderson*, 12 Ill. App. 421, 428; *Ashley v. Holman*, 15 S. C. 97; *Miller v. Hart*, 135 Ind. 201, 203; *Baker v. Groves*, 1 Ind. App. 522, 525.

⁵ *Van Horn v. Hann*, 39 N. J. L. 207, 209.

⁶ See *ante*, § 57.

⁷ *Richardson v. Strong*, 13 Ired. L. 106; *Tally v. Tally*, 2 Dev. & B. Eq. 385; *Seaver v. Phelps*, 11 Pickering, 304; *Coleman v. Frazer*, 3 Bush, 300, 309.

⁸ *Stannard v. Burns*, 63 Vt. 244, 246; *Maughan v. Burns*, 64 Vt. 316, 322.

⁹ *Sawyer v. Lufkin*, 56 Me. 308; *Stannard v. Burns*, 63 Vt. 244, 249.

¹⁰ *Lincoln v. Buckmaster*, 32 Vt. 652, 657; see a discussion of the liability of lunatics upon their contracts by Ch. J. Redfield in this case, p. 657. Also *Baxter v. Portsmouth*, 5 Barnw. & Cr. 170, 172.

furniture contracted for by a spendthrift under guardianship constitutes necessities under a statute making the spendthrift's estate liable for necessities, is a question of fact which an appellate court cannot revise.¹ The liability by implied contract extends to necessities furnished to the lunatic's wife.² In Vermont the liability of one who has been put under guardianship as an insane person, for necessities furnished under contract with him, is based upon the principle that the adjudication of insanity is not conclusive against the ability of the party so adjudged to make a valid contract for necessities;³ to make such adjudication available as a defence, it should be accompanied with evidence showing that the insanity was of that character which disqualified the defendant from making a valid contract.⁴

What constitutes necessities is a question of fact.

Presumption in Vermont.

The law raises only a reasonable promise to pay for necessities furnished a person of unsound mind; hence, as above intimated, the defendant will not be held liable unless the services rendered or articles furnished have proved beneficial to him.⁵ Thus it is held in New York that where a solicitor appears in behalf of a person against whom a commission of lunacy is issued to oppose the same, he has no claim against the estate of the lunatic on the ground of the contract for his services if the jury find the party to have been a lunatic at the time of the retainer.⁶ Nor is an attorney entitled to an action on the ground of a contract with one under a commission of lunacy to obtain for him a *supersedeas* of the commission, if the issue is found against the party's sanity.⁷ But a man who, by reason of habitual drunkenness, is incapable of managing his affairs, may make a valid contract for necessities, including such things as are useful and proper for his station; and according to this principle he may contract with an attorney to have a

Where services rendered do not prove beneficial, lunatic is not liable.

Drunkard's contract with an attorney to have a guardian appointed for him may be binding.

¹ Leonard v. Stott, 108 Mass. 46.

² Pearl v. McDowell, 3 J. J. Marsh. 658, 662; Booth v. Cunningham, 126 Ind. 431, 433, citing English cases.

³ Stannard v. Burns, 63 Vt. 244, 246; Blaisdell v. Holmes, 48 Vt. 492.

⁴ Motley v. Head, 43 Vt. 633, 639.

⁵ Lincoln v. Buckmaster, 32 Vt. 652, 657.

⁶ Matter of Conklin, 8 Paige, 450 (but the court allowed the solicitor his

taxable costs, there being so much doubt about the fact of lunacy that the Chancellor, if applied to, would have directed such opposition).

⁷ Carter v. Beckwith, 128 N. Y. 312, 315. In this case, also, the court held that the attorney's charges might, in the discretion of the court, be allowed out of the lunatic's estate, recoverable, after the lunatic's death, by action against the personal representative.

guardian appointed for his protection under the statute, and recover a reasonable fee from the estate of the drunkard for his services.¹ So where one is restrained of his liberty with-

out legal process, as an insane person, and employs counsel to prosecute a writ of *habeas corpus* in his behalf, for the purpose of investigating the grounds and circumstances of the restraint, such counsel is

So the employment of counsel to prosecute writ of *habeas corpus*.

entitled to recover a reasonable compensation for his services rendered in good faith, if the condition of the party be such as to render investigation proper.²

Insane persons are also liable in damages for any *tort* they may commit, although they cannot be punished criminally;³ and this

Lunatics are liable for torts, although having a guardian.

liability exists, although the lunatic was at the time under guardianship, and the damage complained of was caused by the defective condition of a place (not in the exclusive occupancy and control of a tenant) on real estate of which he is the owner, and of which his guardian had the care and management;⁴ and although the plaintiff knew him to be insane and might have prevented the commission of the act.⁵ But a lunatic is not liable for punitive damages, under circumstances which might render a sane person so liable,⁶ nor for damages where the wrong lies in the intent.⁷ So a person or corporation, knowingly employing or commissioning a lunatic to follow a dangerous avocation, will be liable to innocent third parties for any damages resulting from acts done by such lunatic while so employed.⁸

Under a statute of Kansas, the verdict of a jury lawfully empanelled for such purpose, finding a person to be insane or a habitual drunkard, exempts such person from trial, imprisonment, or being held to bail on a criminal charge, so long as such verdict is operative.⁹

§ 142. **Respective Liability of Guardians and of Lunatics on Contracts after Inquisition.** — It has been already mentioned, that com-

¹ *Darby v. Cabanné*, 1 Mo. App. 126. To similar effect: *Brownlee v. Switzer*, 49 Ind. 221.

² *Hallett v. Oakes*, 1 Cush. 296.

³ *Busw. on Ins.* § 355, and authorities cited; *Lancaster Bank v. Moore*, 78 Pa. St. 407, 412.

⁴ *Morain v. Devlin*, 132 Mass. 87, and

numerous authorities, both English and American, cited by Gray, C. J., p. 88.

⁵ *Morse v. Crawford*, 17 Vt. 499.

⁶ *Ward v. Conatser*, 4 Baxt. 64, 66; *Kron v. Schoonmaker*, 3 Barb. 647, 650; *Cross v. Kent*, 32 Md. 581, 583.

⁷ *Jewell v. Colby*, 66 N. H. 399.

⁸ *Cole v. Nashville*, 4 Sneed, 162.

⁹ *Matter of Kidd*, 40 Kans. 644.

mittees or guardians cannot by their own acts or contracts bind their wards.¹ Hence, no action lies against a lunatic for necessities purchased for him by the guardian, even after he has recovered his reason, and after the guardian has restored his property to him, without retaining any part of it to indemnify himself for his liability on account of his ward.² But if the former ward, after his restoration, promise to pay the debt incurred for him by his guardian, such promise will support an action; and the guardian, having paid the debt, may recover from his former ward.³

No action by guardian against his ward for necessities furnished.

Contracts made by guardians, either of minors or of persons of unsound mind,⁴ though made in behalf of their wards, bind the guardians personally, so that the recovery thereon must be by action against them, not against the ward.⁵

Contracts bind guardians personally,

The liability of the guardian is in some States charged on the guardian's bond, so as to make his sureties liable to the creditor having furnished necessities for the use of a drunkard and his family at the request of the guardian.⁶

and their sureties.

So a committee is personally liable for the rent of premises demised to his ward, and which the committee occupies in transacting the ward's business;⁷ but the committee does not thereby take title to the leasehold, and no privity is created between him and the lessor; his possession is the possession of the court, of which he is the mere bailiff or servant, hence the lessor's remedy, if the committee no longer occupies the premises, is that of an ordinary creditor against the lunatic's estate.⁸

Committee liable for rent under lease made for his ward,

but does not take the title.

Where there is an express contract in writing, whereby third persons agree to pay the board and other expenses of an insane person at an asylum, no promise can be implied, because there is no room for an implied contract where an express contract exists; and evidence that credit was given by the officers of the asylum to the estate of the insane person is inadmissible.⁹ In such case the insane person does

Insane person is not liable by reason of express contract by another.

¹ *Ante*, § 141.

² *Westmoreland v. Davis*, 1 Ala. 299.

³ *Westmoreland v. Davis*, *supra*.

⁴ As to guardians of minors, see *ante*, § 57.

⁵ *Miller v. Hart*, 135 Ind. 201, 203; *Kowing v. Moran*, 5 Dem. 56, 59; *Thacher v. Dinsmore*, 5 Mass. 299, 301.

⁶ *State v. Fitch*, 113 Ind. 478, 481.

⁷ *Matter of Otis*, 34 Hun, 542; affirmed on appeal: 101 N. Y. 580.

⁸ *Matter of Otis*, 101 N. Y. 580, 585.

⁹ *Massachusetts v. Fairbanks*, 129 Mass.

not become liable, although one of the persons signing the contract mentioned did so in anticipation of being appointed guardian, and after the insane person had been an inmate of the asylum for a fortnight; and although it was understood by both of them, that the board would be furnished upon the insane person's credit, their liability therefor being only collateral to that of said insane person; and although the original terms for the boarding were afterwards changed with the guardian's consent, and though the guardian subsequently agreed to pay, and did pay part of, the debt out of his ward's estate.¹

It results from the doctrine that persons of unsound mind under guardianship cannot, either in person or through their

Neither guardian nor ward can engage in business without order of court.

guardians, bind themselves by any contract, except for necessities, that neither the guardian of such ward nor the ward himself can engage in any trade or business so as to bind the lunatic's estate, without authority

from the court. Whether the court having jurisdiction over the lunatic's estate can make an order conferring such authority, depends upon the power conferred on such court by the statute,

Whether court has power to make such order, *quære*.

or, it may be, by the absence of statutory restriction.

Under a statute making it the duty of every guardian "to prosecute and defend all actions instituted in behalf of or against his ward; to collect all debts due or becoming due to his ward, and give acquittances and discharges therefor; and to adjust, settle, and pay all demands due or becoming due

Rulings in Missouri

from his ward, so far as his estate and effects will extend,"² it was held, that as a matter of law the

guardian as such could not, in the absence of an order of the court authorizing him thereto, conduct or engage in any business for, or by transactions pertaining to such business bind the estate of the lunatic. And that under a statute authorizing a probate

negating such power.

court to "make an order for the restraint, support, and safe-keeping of such person, for the management of his estate, and for the support and maintenance of his family, and the education of his children, out of the proceeds of such estate; to set apart and reserve for the payment of debts, and to let, sell, or mortgage any part of such estate, real or personal, when necessary for any of the purposes above specified,"³ the

¹ *Massachusetts v. Fairbanks*, 132 Mass. 414, 420.

² Wag. St. (Mo. 1872) p. 714, § 18.

³ Wag. St. (Mo. 1872) p. 714, § 19.

court had no power to authorize the continuance of the business, or any business transactions in behalf of the lunatic; or to bind his estate by reason thereof, except in special exigencies as a temporary order to preserve the property of the estate, or to make it available for purposes of sale or otherwise;¹ and it matters not that the conducting or continuance of such business would be profitable to the estate.² "The guardian of an insane person is a trustee; . . . as such he has no authority to subject the estate in his charge to the risks and hazards of any trade or business undertaking. . . . When he employs the assets of the beneficiary in trade or speculation, or in the establishment or continuance of a manufacturing business, . . . he does so in violation of the trust by which he holds them.³ Nor is the guardian authorized to permit his ward to transact business as if sane; and those having notice of the adjudication of lunacy trade with the ward, even with the consent of the guardian, at their peril. The guardian paying debts so incurred by his ward will not be allowed credit therefor in his accounting.⁴ In such case, where the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent with liability; and the guardian, also, is not liable.⁵

But the case of *Michael v. Locke*, so far as it denied the power of the Probate Court to authorize the guardian of an insane person to continue and carry on the business established by the ward before the inquisition, was overruled in a later case, construing the statute referred to as investing the Probate Court with large discretionary powers, to direct and order the continuance of the business of the ward. The difference between the functions of an executor and the guardian of an insane person is pointed out: "There," says Judge Black, "the general purpose of the law is to wind up the estate, pay off the debts, and turn over the remainder of the property to those entitled to the same in succession. . . . In the case of an insane person, the ward continues to be the owner of the property. He and his

¹ *Merritt v. Merritt*, 62 Mo. 150, 153 (case of an administratrix involving a similar principle).

² *Western Cement Co. v. Jones*, 8 Mo. App. 373, 379; *Michael v. Locke*, 10 Mo.

App. 582. To similar effect: *Munday v. Mims*, 5 Strobb. L. 132.

³ *Michael v. Locke*, 80 Mo. 548, 551.

⁴ *Coleman v. Farrar*, 112 Mo. 54, 73.

⁵ *Western Cement Co. v. Jones*, *supra*; *Michael v. Jones*, 84 Mo. 578, 582.

family are to be supported, his children to be educated, and it is not practicable to close up his affairs. Hence, the bond of the guardian is conditioned to ‘*manage and administer his estate, &c.*’ “It is rather the duty of the guardian to protect and preserve the business affairs of the ward than to wind them up. To that end the statute has invested the Probate Court with large discretionary powers.”¹

The Supreme Court of Massachusetts decided, in a case turning upon the right of a guardian to credit for disbursements in continuing the manufacturing business which had been carried on by his ward, that inasmuch as such business had been carried on at the request, or with the concurrence of all parties interested in the ward’s estate, and resulted advantageously to the estate, the guardian was entitled to the credit; but declined to express any intimation as to the guardian’s liability if there had been a loss.²

A conservator may, by permission and direction of the court having appointed him, perform the personal contracts of his ward made in good faith and legally subsisting at the time of his disability and which may be performed with advantage to the estate.³

§ 143. Suits by or in behalf of Persons of Unsound Mind. — Since all persons of unsound mind are capable not only of holding, but also of acquiring property, the law gives to them, as an inseparable concomitant to such right, the right of action. “By a uniform and uninterrupted current of authorities, from the time of Fitzherbert to the present period, it has been established that an idiot or lunatic may sue and be sued.”⁴ The appearance in an action by a person of unsound

mind is by attorney, or any competent person as next friend, if he be an adult not under guardianship;⁵ but by guardian, if a minor.⁶ In a proceeding instituted by one describing himself as next friend of the insane plaintiff, the court has power to supersede such next friend by a guardian *ad litem*, when, in its just

¹ State v. Jones, 89 Mo. 470, 477.

² Murphy v. Walker, 131 Mass. 341.

³ Wilcox v. Parker, 23 Ill. App. 429, 431.

⁴ Cameron v. Pottinger, 3 Bibb, 11, 12; Chicago v. Manger, 78 Ill. 300; Newcomb

v. Newcomb, 13 Bush, 544, 578; Jetton v. Smead, 29 Ark. 372, 381.

⁵ Holzheiser v. Gulf, 33 S. W. (Tex.) 887.

⁶ Reese v. Reese, 89 Ga. 645, 651; Shaw v. Burney, 1 Ired. Eq. 148, 150;

discretion, it finds it for the interest of the petitioner to do so.¹ Where the question of sanity or insanity is involved in the subject-matter of the suit, it may be tried irrespective of whether a commission of lunacy has been issued or not.²

But if a guardian or committee have been appointed by a court for the protection of an insane person, habitual drunkard, or spendthrift, there is some diversity in the law whether the action in behalf of such person is to be brought by or in the name of the ward himself, or by or in the name of his guardian or committee. The answer to this question depends on various circumstances, and is not uniform in the different States. The rule is said to be well settled, that in actions at law for the vindication of the rights of an insane person, he must himself be a party.³ It is not sufficient that such action be brought by the guardian, or in the name of the guardian.⁴

Lunatic must be party to an action at law.

A different rule prevails in equity, where bills are brought in the name of the guardian or committee, or in the name of the lunatic by his committee.⁵ If the lunacy appear on the face of the bill, and no next friend or committee is named therein, the objection may be raised by demurrer, or by motion to take from the files;⁶ or by plea in abatement,⁷ and where such objection is not made in proper time, it may be taken as waived, and cannot be raised for the first time on appeal.⁸

Guardian must be a party in equity,

but objection must be taken by demurrer or plea in abatement.

McCreight v. Aiken, 1 Rice L. 56, 59; Amos v. Taylor, 2 Brev. 20; Lang v. Whidden, 2 N. H. 435, 436. In the last mentioned case attention is called to English authorities distinguishing between idiots, who cannot appear by guardian, *prochein ami* or attorney, but ever in person and lunatics, who, like infants, may appear by *prochein ami* and defend in person.

¹ King v. McLean, 64 Fed. R. 331, 356, quoting from Sale v. Sale, 1 Beav. 586, 587. In this case (a petition filed by a next friend for an infant) the Master of the Rolls said: "It matters little what the nature of the suit is; when a party comes here using the privilege of acting on the behalf and as the next friend of infants, it is his bounden duty to show that he really acts for the benefit of the infant, and not to promote interests of his own." See also King's Case, 161 Mass. 46. The proceeding in both cases was on a peti-

tion for the release of a person confined in an insane asylum.

² Reese v. Reese, 89 Ga. 645.

³ Lombard v. Morse, 155 Mass. 136, 138; Crane v. Anderson, 3 Dana, 119; Allen v. Ranson, 44 Mo. 263, 265; McCreight v. Aiken, 1 Rice L. 56, 59; Petrie v. Shoemaker, 24 Wend. 85; Brooks v. Brooks, 3 Ired. L. 389; Dorseheimer v. Roorback, 18 N. J. Eq. 438; Green v. Kornegay, 4 Jones L. 66, 69.

⁴ Reed v. Wilson, 13 Mo. 28; Shaw v. Burney, 1 Ired. Eq. 148, 150; Riggs v. Zaleski, 44 Conn. 120.

⁵ Shaw v. Burney, 1 Ired. Eq. 148, 150; McCreight v. Aiken, 1 Rice, 56, 59; Norcom v. Rogers, 16 N. J. Eq. 484; Dorseheimer v. Roorback, 18 N. J. Eq. 438; Gillespie v. Hanenstein, 17 So. 602.

⁶ Norcom v. Rogers, *supra*; Gorham v. Gorham, 3 Barb. Ch. 24, 34.

⁷ Jetton v. Smead, 29 Ark. 372, 381.

⁸ Bird v. Bird, 21 Gratt. 712, 715.

So, in New Hampshire, advantage cannot be taken of the defect after pleading the general issue.¹ Chancellor Walworth recog-

nizes the distinction drawn in English cases between a bill filed to set aside acts done by the lunatic while incompetent, and a bill for the relief of the lunatic not for the purpose of avoiding an act of the lunatic after the loss of his reason. The former bill is held to be properly brought by the committee without making

Distinction between action for relief generally and action to set aside a contract made while insane.

the lunatic himself a party, on the principle that the lunatic should not be compelled to stultify himself;² while the latter must join the lunatic with the committee, or be brought in the name of the lunatic by his committee.³ The reasons alleged by the Chancellor why the lunatic himself should be a party to a suit for the recovery of property claimed for him is, that a suit by the

committee would not, on recovery, bar a second suit by the lunatic himself, or by his representative after his death.⁴ But since the Court of Chancery has, by law, control of the personal estate and choses in

Danger of second suit by lunatic, if not party to the first,

action of the lunatic, the court may effectually protect the defendant, if the matter has been fairly litigated by the committee in the Chancery Court. It is accordingly held that the objection to the non-joinder of the

may be guarded against in equity.

lunatic with his committee is a matter of form, and not of substance,⁵ and it is immaterial, in a chancery proceeding, whether the lunatic be joined with the committee or omitted.⁶ But the better practice seems to be to join the lunatic.⁷

¹ *Lang v. Whidden*, 2 N. H. 435, 437.

² This rule is mentioned in a number of cases; among them *McCreight v. Aiken*, 1 Rice L. 56, 58; *Gorham v. Gorham*, 3 Barb. Ch. 24, 31; *Lombard v. Morse*, *supra*; but it has now given place to the rule that a man may show that he was utterly devoid of reason, so that he could not understand the contract entered into, and is then not bound by it: *McCreight v. Aiken*, *supra*; *Webster v. Woodford*, 3 Day, 90, 100; *Mitchell v. Kingman*, 5 Pickering, 431; *Tolson v. Garner*, 15 Mo. 494, 497; *Bishop v. Hunt*, 24 Mo. App. 373.

³ *Gorham v. Gorham*, 3 Barb. Ch. 24, 31, reviewing the English cases on the subject.

⁴ To same effect: *Ueberoth v. Union Bank*, 9 Phila. 83.

⁵ *Gorham v. Gorham*, 3 Barb. Ch. 24, 35.

⁶ *Ortley v. Messere*, 7 Johns. Ch. 139.

⁷ "The practice of instituting such a suit [for a right of an insane person] in the name of the committee only is sustained by high authority: *Sto. Eq. Pl. § 64*; *Ortley v. Messere*, 7 Johns. Ch. R. 139. But where, as in this State, the maxim of the common law, that one cannot stultify himself, is not recognized, it is certainly better to follow the general rule of pleading, to make all parties to the suit who are materially interested in the object of it, and not to litigate and adjudge concerning the estate of any person, even a lunatic, who is not before the court;" *Sims v. McLure*, 8 Rich. Eq. 286; *Ashley v. Holman*, 15 S. C. 97, 105.

But in States where the guardian has no title or interest in the ward's estate, the guardian cannot maintain a bill in his own name to avoid a conveyance or transfer of his property by the ward; it must be brought in the name of the ward, and the rule against self-stultification does not apply.¹ A committee or guardian, however, being in charge of the lunatic's property, may sue like a bailiff in his own name for any right belonging to him, or for damages arising out of any injury to his possession, or upon his own contract relating to the lunatic's property.² Thus the right of action on a note, given by a purchaser from the guardian of a spendthrift for standing trees on his ward's land, is in the guardian, and the ward cannot discharge them, even after release from his wardship, if there be a balance due from the ward to the guardian for advances.³ So a guardian was allowed to maintain detinue to enforce the return of a slave belonging to his ward, on a contract of hiring made by him as guardian.⁴ The committee of a lunatic who has performed valuable services for a former committee having since died, may bring action against the deceased committee's estate on the implied promise to pay for such services without joining the ward.⁵

Guardian cannot sue at law to set aside lunatic's conveyance,

except for his own interest.

Suits in behalf of persons of unsound mind must be brought by, or in the name of, the committee or guardian of such person, or such committee or guardian must at least join in such suits in Alabama,⁶ Florida,⁷ Georgia,⁸ Indiana,⁹ Iowa,¹⁰ Kansas,¹¹ Missouri,¹² New Hampshire,¹³ New Jersey,¹⁴ North Carolina,¹⁵ Ohio,¹⁶ Pennsylvania,¹⁷

Statutes requiring suits to be brought in name of guardian.

¹ *Lombard v. Morse*, 155 Mass. 136, 138.

² *Cameron v. Pottinger*, 3 Bibb, 11; *Crane v. Anderson*, 3 Dana, 119; *Nickerson v. Gilliam*, 29 Mo. 456; *Field v. Lucas*, 21 Ga. 447, 451; *Warden v. Eichbaum* (ejectment), 14 Pa. St. 121.

³ *Thompson v. Boardman*, 1 Vt. 367, 371.

⁴ *Crane v. Anderson*, 3 Dana, 119.

⁵ *Ashley v. Holman*, 15 S. C. 97, affirmed as to the right of action in 25 S. C. 394, 402, but reversed on the question of sufficiency of the evidence.

⁶ *Dearman v. Dearman*, 5 Ala. 202.

⁷ Rev. St. 1892, § 982.

⁸ *Field v. Lucas*, 21 Ga. 447, 451.

⁹ *Bearss v. Montgomery*, 46 Ind. 544,

548; the lunatic cannot sue by solicitor: *Jelly v. Elliott*, 1 Ind. 119.

¹⁰ *Chavannes v. Priestley*, 80 Iowa, 316, 321; suit cannot be brought by next friend: *Tiffany v. Worthington*, 65 N. W. (Iowa) 817.

¹¹ *Gustafson v. Ericksdotter*, 37 Kans. 670.

¹² Rev. St. 1889, § 5531.

¹³ *Lang v. Whidden*, 2 N. H. 435, 437.

¹⁴ In equity, but at law the idiot or lunatic sues by next friend: *Dorsheimer v. Roorback*, 18 N. J. Eq. 438.

¹⁵ In equity: *Latham v. Wiswall*, 2 Ired. Eq. 294.

¹⁶ Rev. St. 1890.

¹⁷ *Warden v. Eichbaum*, 14 Pa. St.

Vermont,¹ Virginia,² and probably other States. In Louisiana, insane persons are incompetent to prosecute a suit, either in their own behalf or as tutors of minors,³ and in Maryland,⁴ Tennessee,⁵ and Texas,⁶ it is held that where a lunatic having no guardian or committee brings an action, it must be by next friend, or some one must be joined with him to become responsible for costs.

Petition must show right of action in the ward.

The petition in a suit by the guardian or committee of an insane person must show that the right of action is in the ward;⁷ but it is sufficient to aver that the party for whom the suit is brought has been adjudged a person of unsound mind, and that the plaintiff has been duly appointed his

Suit of one becoming insane after suit brought, must be prosecuted in the name of such person by his guardian.

guardian.⁸ Where a plaintiff becomes insane after beginning an action, it is error to substitute the guardian as sole plaintiff; the suit should be prosecuted in the name of the plaintiff, as an insane person, by his guardian.⁹ So in Texas; nor can a wife be substituted as plaintiff in an action begun by her husband before his insanity.¹⁰

It was held in Massachusetts, that a spendthrift under guardianship can maintain no action in his own name alone for an assault

Ward cannot sue his guardian for an assault and battery.

and battery committed on his person by his guardian, on the ground that a civil action can only be for damages, or a suit for money, which the person under guardianship cannot bring in his own name; and to bring it by guardian would be to have the guardian sue himself.¹¹

In Ohio, suit cannot be brought by the next friend of a lunatic; if the guardian refuses to bring suit, he should be removed, and another appointed.¹²

121, 127; including action for partition: *Klohs v. Reifsnnyder*, 61 Pa. St. 240, 243.

¹ *Collard v. Crane*, Brayt. 18; *Holden v. Scanlin*, 30 Vt. 177, 181; *Lincoln v. Thrall*, 34 Vt. 110, 113.

² *Bird v. Bird*, 21 Gratt. 712.

³ *Kirwin v. Insurance Co.*, 35 La. An. 33, 35.

⁴ *Owing's Case*, 1 Bland Ch. 290.

⁵ *Stephens v. Porter*, 11 Heisk. 341; *Parsons v. Kinser*, 3 Lea, 342, 345.

⁶ *Pelham v. Moore*, 21 Tex. 755.

⁷ *Bearss v. Montgomery*, 46 Ind. 544, 548.

⁸ *Hoke v. Applegate*, 88 Ind. 530, 533.

⁹ *Dixon v. Cardozo*, 106 Cal. 506, citing numerous California cases.

¹⁰ *Texas Co. v. Bailey*, 83 Tex. 19, 23.

¹¹ *Mason v. Mason*, 19 Pickering, 506. Attention is called by the judge deciding this case, to the fact that the ward's redress through the criminal courts is always open to him, and that his civil remedy is only suspended until the guardian's removal, for which the use of unauthorized personal violence would furnish sufficient cause. He also suggests that the suit might, perhaps, be prosecuted by a *prochein ami*. See, as to this principle, *ante*, § 21.

¹² *Row v. Row*, 41 N. E. (Ohio) 239.

It is held in Missouri, that where the guardian sues in his own name, the defendant may plead an indebtedness of the ward to him by way of set-off,¹ while the contrary was held in Pennsylvania.²

The wife of an insane husband, confined in an asylum in another State, was in Vermont allowed to bring an action in her sole name for a wrong personal to herself;³ but in Missouri an insane husband under guardianship cannot be joined with the wife in a suit for property of the wife, the statute requiring the guardian "to prosecute and defend all actions instituted in behalf of or against his ward."⁴ Though the guardian of a lunatic may have the statutory authority to maintain an action of ejectment against a stranger to secure possession of the lunatic's real estate, and to represent his ward in proceedings in partition and valuation of real estate, yet he has no authority to bring suit against the lunatic's wife for the purpose of ejecting her and her children from the home provided for them.⁵

Wife of an insane man allowed to sue in her sole name;

but insane husband under guardianship cannot be joined with the wife for her property.

§ 144. *Insanity as a Cause for the Annulment of a Marriage or for Divorce.* — A marriage contracted by a person under commission of lunacy during a lucid interval is good at common law,⁶ the question being, whether at the very time of the marriage both parties were capable of consenting.⁷

Marriage during lucid interval good at common law.

So there can be no annulment of a marriage on the ground that defendant is a lunatic, unless it appear that the insanity existed at the time of the marriage.⁸ The institution of proceedings for the appointment of a guardian, together with the appointment of a guardian *ad litem* for the defendant was held insufficient as proof of notice of the insanity of such party to one about to marry him.⁹ Proceedings to avoid a marriage contracted by one having been found a lunatic and incapable of managing her affairs may be brought by her acting by her committee, as in other cases for equitable relief; and on an application for divorce on that ground, when the fact of incapacity at the time of the marriage is established, the court is bound to

Suit to annul must be in guardian's name.

¹ Nickerson v. Gilliam, 29 Mo. 456.

² Beale v. Coon, 2 Watts, 183.

³ Gustin v. Carpenter, 51 Vt. 585.

⁴ Hayes v. Miller, 81 Mo. 424.

⁵ Shaffer v. List, 114 Pa. St. 486, 489.

⁶ 1 Bishop on Marr. Div. & S. § 603.

⁷ 2 Bish. M. D. & S. § 1243; Nonnemacher v. Nonnemacher, 159 Pa. St. 634.

⁸ Forman v. Forman, 24 N. Y. Supp. 917.

⁹ Barber v. Barber, 74 Iowa, 301.

Guardian *ad litem*, if there be no guardian. pronounce a decree of nullity.¹ And if the insane person has no guardian or committee, the court will, on the application of a third party and proof of insanity, appoint a guardian *ad litem* to conduct the cause of the libellant,² or continue the trial until the proper court has appointed a guardian.³ Actions for divorce may be prosecuted for an insane plaintiff either by guardian, or next friend appointed by the court; and if during the pendency of a suit the respondent becomes insane, the case will be continued so long as there is hope that he will recover,⁴ but if the insanity is hopeless, the plaintiff and defended by guardian, or guardian *ad litem*. may proceed, and the defence may likewise be conducted by the guardian appointed by the proper court, or, if there be none such, by a guardian *ad litem* appointed by the court in which the suit is pending; and the fact that both parties were insane when the petition was filed, affords no conclusive reason for dismissing it.⁵

Assuming that insanity can in any case afford a defence to proceedings for divorce, it is only when the insanity is permanent and abiding, without hope of recovery or amelioration.⁶

But neither the lunatic in person, nor a *prochein ami*, can maintain the action for divorce; the right to institute such suit is strictly personal to the husband or wife, and the will of the *prochein ami* may not be the will of the lunatic; Neither lunatic in person, nor next friend, can maintain suit for divorce, courts will regard only the *intelligent* will of the party, and the intervention of a next friend in bringing the suit is an indirect admission that it was not brought during a lucid interval, for then it would have been in the name of the party plaintiff.⁷ So a court of equity will, on the petition of a conservator, set aside a decree of divorce granted on the petition of an insane wife confined in an insane asylum in another State, whether actual fraud in obtaining such decree be proved or not.⁸ In Iowa it is held, that the guardian of an insane person cannot

¹ Crump v. Morgan, 3 Ired. Eq. 91; See also Rathbun v. Rathbun, 40 How. Pr. 328.
Johnson v. Kincade, 2 Ired. Eq. 470; Waymire v. Jetmore, 22 Oh. St. 271; Foster v. Means, 1 Speer's Eq. 569; Thayer v. Thayer, 9 R. I. 377, 386.

² Denny v. Denny, 8 Allen, 311.

³ Mansfield v. Mansfield, 13 Mass. 412.

⁴ Stratford v. Stratford, 92 N. C. 297.

⁵ Garrett v. Garrett, 114 Mass. 379.

⁶ Hanbury v. Hanbury, L. R. Prob. 222; Yarrow v. Yarrow, L. R. 1 Prob. 92.

⁷ Worthy v. Worthy, 36 Ga. 45. To same effect: Winslow v. Winslow, 7 Mass. 96; Birdzell v. Birdzell, 33 Kans. 433.

⁸ Bradford v. Abend, 89 Ill. 78.

maintain an action in his behalf for divorce, because the petition must under the statute of that State be verified by the oath of the plaintiff.¹ The reasons militating against the right of an insane person to an action for divorce apply equally to the action for alimony as an incident to the action for divorce; and when the statute gives an action for alimony without a divorce for any of the causes for which a divorce may be granted, it will be equally beyond the reach of insane persons, for the reason that they cannot exercise their choice or election to bring such action; and no guardian can do so for them.² So a motion for the allowance of a counsel fee and alimony *pendente lite*, was refused against a defendant who had been declared insane by the court, on the ground that the order moved for would imply a default and neglect of moral obligation which ought not to be imputed to a lunatic.³

nor for alimony
as an incident
to divorce.

Insanity is not, in the absence of a statute so declaring, a ground for divorce; nor does the fact that the wife is, in consequence of her mental disease, prevented from discharging her conjugal duties, and the husband from enjoying that intercourse with her resulting from the marriage relation, constitute impotence as a ground for divorce.⁴

§ 145. **Guardians ad litem for Insane Litigants.** — There was occasion to fully discuss the functions, duties, and liabilities of guardians *ad litem* and other special guardians in connection with the guardianship over minors.⁵ There is little, if any, difference between guardians *ad litem* for minors and those for insane litigants. The latter defend by general guardian or committee, if one has been appointed for them; and where the law requires the appointment of a guardian *ad litem* to an insane defendant, his general guardian or committee will usually be appointed such guardian *ad litem*,⁶ even if the action be against a lunatic or habitual drunkard and his committee jointly, if the latter have no interest adverse to that of his ward.⁷ The appointment of a guardian *ad*

No difference
between guar-
dians *ad litem*
for minors and
for insane
persons.

¹ Shank v. Mohler, 61 N. W. (Iowa) 981; Birdzell v. Birdzell, 33 Kans. 433, 436.

² Birdzell v. Birdzell, *supra*.

³ McEwen v. McEwen, 10 N. J. Eq. 286.

⁴ Pile v. Pile, 94 Ky. 308.

⁵ Ante, § 21.

⁶ Sturges v. Longworth, 1 Oh. St. 544, 552; Rothwell v. Boushell, 1 Bland Ch. 373, note; Post v. Mackall, 3 Bland Ch. 486, 488; Van Horn v. Hann, 39 N. J. L. 207; Security Loan and Trust Co. v. Kaufmann, 108 Cal. 214, 222.

⁷ New v. New, 6 Paige, 237.

Appointment
may be made
even if he has
not been
found insane
by regular
inquisition.

litem may be made for an insane defendant, although he may not have been found to be insane by inquisition,¹ where the insanity is shown to exist, as, for instance, if it is alleged by the defendant and admitted by the plaintiff's attorney; plaintiff in such case may, in the discretion of the court, be allowed to amend, so as to raise the question without prejudice to the defendant.² So if an action at law is brought against an adult *non compos mentis*, he must be defended by an attorney, unless he have a guardian authorized by statute to appear for him, to be appointed by the court, if necessary; and if the court refuses to let the plaintiff go on with his action, "unless he first have a guardian appointed by the Probate Court, and notify the guardian of the pendency of the suit," a *mandamus* will be awarded by the Supreme Court, at plaintiff's instance, to compel the appointment of an attorney to represent

But if there is
doubt as to the
party's insan-
ity, inquisition
should be had.

the defendant.³ But if the insanity has been suggested on affidavit, but not legally ascertained, and there is doubt whether proof can be successfully made, the court is without authority to appoint an attorney, and will continue the case to afford an opportunity for an inquisition.⁴ So in equity, on the suggestion of the defendant's insanity, the court should, before appointing a guardian *ad litem*, ascertain whether the condition of the defendant's mind is such as to require the protection of such a guardian; and for such purpose the court may refer the matter to a master, to report, on a personal examination of the party, aided, if need be, by physicians.⁵

The appointment of a guardian *ad litem* is necessary, also, where a lunatic defendant's committee or general guardian, whose duty it is to appear for and defend him, is himself interested in the matter in controversy;⁶ *a fortiori*, if the committee be the adverse party.⁷ The power to appoint a guardian *ad litem* for an insane defendant exists independently of the

Guardian *ad litem* is necessary if the lunatic's guardian is himself interested in the controversy.

¹ Markle v. Markle, 4 Johns. Ch. 168; Post v. Mackall, 3 Bland Ch. 486, 488; Bensieck v. Cook, 110 Mo. 173, 183.

² Boyce v. Lake, 17 S. C. 481, 483.

³ *Ex parte* Northington, 37 Ala. 496; Faulkner v. McClure, 18 Johns. 134; Cameron v. Pottinger, 3 Bibb, 11. These cases hold, or intimate, that an idiot must appear to an action at law in person, but one who has become *non compos mentis* by

guardian, if a minor, or by attorney, if adult.

⁴ Hollingsworth v. Chapman, 50 Ala. 23.

⁵ Campbell v. Bowen, referring to the English practice in such cases, 1 Robins. (Va.) 241, 250. To similar effect: Speak v. Metcalf, 2 Tenn. Ch. 214.

⁶ Hewitt's Case, 3 Bland Ch. 184; Hinton v. Bland, 81 Va. 588, 591.

⁷ Marx v. Rowland, 59 Wis. 110, 112.

statute, on the ground that the jurisdiction of the court over a party who has been properly served with notice is not avoided by such party's lunacy, and the duty to appoint some one to defend follows, if the party cannot do so himself, and have no one to do it for him.¹ Insane defendants are wards of the court, and hence the guardian *ad litem* is under its control.²

Power to appoint guardian *ad litem* for insane person exists independent of statute.

It is self-evident, that no guardian *ad litem* is necessary for a lunatic plaintiff or defendant, where a committee or general guardian has been appointed over him, whose duty it is to prosecute for or defend his ward,³ as is provided by statute in many States.⁴ Nor will a guardian *ad litem* be appointed after judgment has been rendered, to represent the insane defendant in the question of approving a sale under execution issued on such judgment.⁵ There can be no appointment of a guardian *ad litem* for an insane person who has not been made party to the suit;⁶ nor does the appointment of a guardian *ad litem* to an insane defendant, in a suit brought by his general guardian, give jurisdiction to the court, if the insane person has not been served with notice of the proceeding.⁷

No guardian *ad litem* for an insane person having a general guardian whose duty it is to appear for him.

The appointment of a guardian *ad litem* is held *prima facie* proof of insanity in any subsequent stage of the case;⁸ and such appointment, if the guardian *ad litem* accept the trust, is sufficient to validate a judgment rendered against the insane person, although the guardian did not act; and to protect the purchaser at a sale under execution thereon.⁹

Appointment of guardian *ad litem* is *prima facie* proof of insanity of the ward.

In Wisconsin, where for a time incurable insanity was by statute made a ground for divorce,¹⁰ and where the statute required the appointment of a guardian *ad litem* by the Circuit Court, it was held that the appointment of a general guardian by the court having jurisdiction in lunacy, does not suspend the functions of the guardian *ad litem*.¹¹

¹ Hanley v. Brennan, 19 Abb. N. C. 186. See also Bensieck v. Cook, 110 Mo. 173, 183; Mitchell v. Kingman, 5 Pickering, 431.

² Austin v. Bean, 101 Ala. 133, 147.

³ McAlister v. Lancaster, 15 Neb. 295.

⁴ See, for instance, the law of Indiana: Yount v. Turnpaugh, 33 Ind. 46; Kentucky: McNees v. Thompson, 5 Bush, 686,

687; Missouri: Rev. St. 1889, § 5530; Nebraska: McAlister v. Lancaster, *supra*.

⁵ Kuhn v. Kilmer, 16 Neb. 699, 702.

⁶ Boyd v. Dodson, 66 Cal. 360.

⁷ Estate of Hunter, 84 Iowa, 388, 392.

⁸ Little v. Little, 13 Gray, 264.

⁹ Foster v. Jones, 23 Ga. 168.

¹⁰ Repealed in 1882.

¹¹ Hicks v. Hicks, 79 Wis. 465, 470.

CHAPTER XIX.

OF THE CONTROL OF THE WARD'S PERSON AND ESTATE.

§ 146. **Management of the Ward's Person.** — It has already been mentioned that chancery guardians to insane persons are the mere bailiffs or servants of the court, subject to its orders in everything pertaining to the maintenance of the ward and of his family, while guardians appointed by probate or other courts having statutory jurisdiction of insane persons are clothed with powers pointed out by statute, including, generally, the power to fix the location of the ward's person, determine his domicil, and such powers as a parent has over his child and a guardian over a minor ward.¹ The control that guardians of spendthrifts have

Guardian has
no control of
a spendthrift's
person;

but may make
himself liable
to the ward for
his services,

if rendered for
the guardian's
profit.

Guardian's
duty to incul-
cate habits of
industry in
spendthrift.

over their wards does not, without statutory provision to that effect, extend to the restraint of their persons, nor to binding them out as apprentices.² But where

a lunatic renders valuable services to his committee, the committee may lawfully make himself liable to pay for the same, and in such case, if the committee die, a subsequent committee of the lunatic may bring action against the representatives of the deceased committee for an account of the profits of such lunatic;³ provided, that such ser-

vices were enforced by the committee upon the ward, for the committee's own profit, rather than for the discipline, health, and happiness of such ward; in which latter case there is no accountability by the committee.⁴

In New Hampshire the statute imposes upon the guardian the duty to inculcate the spendthrift with habits of sobriety and industry, and authorizes him to employ the spendthrift and his children in any

¹ See *ante*, § 137, on the functions of guardians to insane persons.

² *Boyden v. Boyden*, 5 Mass. 427.

³ *Ashley v. Holman*, 15 S. C. 97, 104; s. c. 25 S. C. 394, 403.

⁴ *Ashley v. Holman*, 25 S. C. 394, 404; s. c. 21 S. E. (S. C.) 625, 631.

suitable labor, and to bind them out to labor by written contract.¹ The statute providing for the protection of spendthrifts is, it is said,² founded on considerations of great public policy, and to restrain the spendthrift from a course of vicious excesses by taking from him the means of indulging them, and thus to save both himself and his family from distress and ruin, as well as to save the town from expense for their support. A spendthrift under guardianship cannot lawfully be arrested on execution in an action of contract against him, because he is by law deprived of all power over his own property, and of the means of applying it to the payment of his debts.³

Spendthrift cannot be taken in execution for debt.

Chancery courts have the care and custody of the person, as well as of the estate, of a habitual drunkard put under guardianship, exercising such control through the committee, as in cases of lunacy. Such committee decides, subject to the superintending control of the court, as to the proper residence of the drunkard, and is responsible for the consequences of neglect to take proper care of his person. And it is the duty of the court to aid and protect the committee in the proper exercise of this right, and to give him directions on the subject when necessary. If a third person, without the consent of the committee, takes custody of or harbors the drunkard, the court may, on an *ex parte* application of the committee, order such person to deliver up the ward, and disobedience to such order will be punished as a contempt of court.⁴ So the court may prohibit vendors of intoxicating liquors from furnishing same to a habitual drunkard against the wishes of his committee, on pain of being held liable for a criminal contempt; and will direct the committee, in case of disobedience to the order, to apply to the court to punish the offenders, or to lay the matter before the grand jury, that they may proceed by indictment against them.⁵

Control of chancery courts over drunkards through the committee, who is responsible for neglect in taking care of them.

Court may prohibit vendors from furnishing intoxicating liquors to the drunkard.

In Louisiana it is by statute made the duty of the judge to

¹ Publ. St. 1891, ch. 179, § 6.

² Per Shaw, C. J., in *Norton v. Leonard*, 12 Pickering, 152, 160.

³ *Kavanaugh v. Kavanaugh*, 146 Mass. 40; *Blake's Case*, 106 Mass. 501.

⁴ *Matter of Lynch*, 5 Paige, 120.

⁵ *Matter of Hoag*, 7 Paige, 312; *Matter of Heller*, 3 Paige, 199, 202.

Condition of interdict to be reported to court. appoint a superintendent to inform the court every three months of the health and treatment of the person interdicted.¹

The guardian's duty in respect of the comfort and support of the ward and his family has been discussed in a previous section.²

§ 147. **Management of the Ward's Estate.** — The business affairs of the ward should be managed by the guardian in person; and only under peculiar circumstances will he be excused for allowing them to be transacted by others,³ and when he does so, he will be liable for any loss occasioned by his agent's negligence.⁴ The authority of guardians of insane persons to carry on the trade, business, or manufacturing establishment in which the ward had been engaged while sane, is discussed in connection with their liability on contracts after the inquisition.⁵

Carrying on insane ward's business. The committee of an insane surviving partner is charged with the duty of exercising the rights and vindicating the interest of his ward in the possession and control of the partnership effects; and when necessary he must bring suit to collect debts owing to the partnership. Such action, however, cannot be brought in the name of the committee alone; the lunatic and the committee must both join therein.⁶ It is held, in Pennsylvania, that a person found by inquisition to be a habitual drunkard is not thereby deprived of his power to perform the office of executor or administrator.⁷

Habitual drunkard not disqualified as executor. The power of a committee to lease the lands of his insane ward is, at common law, conditioned upon an order of court;⁸ but this rule, says Johnson, J., in *De Treville v. Ellis*,⁹ will be found on investigation to oper-

¹ Voorh. Rev. C. C. 1889, § 424.

² *Ante*, § 138.

³ Where, for instance, relatives of the ward, who are conversant with his affairs, are requested by the children and heirs at law of the lunatic to have the care and custody of his person, and to look after his business affairs: *Racouillat v. Requena*, 36 Cal. 651, 655.

⁴ *Matter of Gallagher*, 17 N. Y. Supp. 440.

⁵ *Ante*, § 142.

⁶ The committee, as managing the affairs of one incapable of doing so himself, the lunatic, because he may recover his understanding, and then is to have the management and disposal of his own estate: *Uberoth v. Union Bank*, 9 Phila. 83. See, on the question of lunatics as parties, *ante*, § 143.

⁷ *Sill v. McKnight*, 7 Watts & S. 244.

⁸ *Pharis v. Gere*, 110 N. Y. 336, 346.

⁹ *Bailey Eq.* 35, 39.

ate no further than to prevent his binding the estate after the termination of the trust, and that letting the lands of the lunatic from year to year is no violation of the rule. In America this power is very generally conferred on guardians by statute. A statute providing that conservators "shall have the charge of" and "manage" the estates of their wards, is held to confer upon them the power to make leases for a reasonable time of the real estate of their wards; and that a conservator having made such a lease can recover possession of the premises on the expiration of the term in his own name.¹ In Ohio leases made by a guardian determine on the death or restoration to reason of the lunatic, but the lessee, if the lease be not confirmed by the ward or his personal representative, has a lien on the premises for any sum expended in pursuance of the lease for which he has not been compensated.² But leases for three years may be made without order of court; and, if necessary for the support of the ward, or found to be to his best interest, the court may, on proper petition and proof, order the ward's real estate to be leased for any number of years, or perpetually,³ at a rental not less than the amount fixed by appraisers, to be approved by the court.⁴

Extends only to the period of the ward's disability.

In Ohio lessee has lien on the premises for expenditures, on termination of the lease by death, or restoration of the ward.

A court of chancery will, on petition of a committee without bill, grant an order against the commission of waste on the lunatic's land; and, for disobedience to such an order, rule the wife and adult sons of the lunatic to show cause why they should not be attached.⁵

Court of chancery will stay waste on guardian's petition.

It was held in Vermont, that although an idiot is under the general law to be listed among those whose property is liable for taxation, yet he is not liable to be proceeded against for non-payment of taxes, in the absence of special provision by the legislature for such a case.⁶

Idiot is not to be proceeded against for delinquency in paying taxes.

Committees or guardians of insane persons appointed by chancery courts are dependent upon the order of the court

¹ *Palmer v. Cheseboro*, 55 Conn. 114; distinguishing between the statute construed in the case of *Treat v. Peck*, 5 Conn. 280, 287, authorizing conservators "to take care of and oversee" the estates of their wards, and held in said case not to confer authority to lease their estates

from year to year, and the language of the statute quoted in the text.

² Ohio Rev. St. 1890, § 6308.

³ *Ib.*, §§ 6309, 6310.

⁴ *Ib.*, § 6312.

⁵ *Matter of Hallock*, 7 Johns. Ch. 24

⁶ *Hunt v. Lee*, 10 Vt. 297, 303.

Ward's real estate can be sold only under order of court.

Safest course is to obtain order for sale of personalty,

and to comply literally with the forms and requirements of the statute.

But sales of personal property fairly made may be upheld.

having appointed them for authority to alienate the property of the ward.¹ As to the sale of real estate of such persons, the law will be discussed later on.²

But with respect to personal property, the safest course for a guardian will be to obtain the order of a competent court for authority to make sale of any property of the ward. In States investing probate or common law courts with jurisdiction in lunacy, the matter is generally regulated by statute, and it is unsafe for the guardian as well as for the purchaser, if in a sale of the real or personal property of an insane ward the forms and requirements pointed out by the statute are not literally complied with. But it is held in North Carolina that a sale of personal property fairly made by the guardian of a lunatic, under

an order of a court of competent jurisdiction "to sell Patience and her three children, the property of" (the ward) "for the purpose of paying debts," the purchaser acquired a good title.³ In Ohio, where, it seems, the guardian of an insane person has

authority, without an order of court, to sell his ward's personal estate "when for the interest of the ward," it is held that an assignment by the guardian of his ward's interest in a chose in action will not be upheld, if made without meritorious consideration.⁴ So it was held in Massachusetts⁵ that in the absence of statutory inhibition guardians of insane persons have authority to sell their wards' personal property; and that the statutory grant of such power under order of the court, does not divest them of this power. So in Connecticut.⁶

As a general rule, guardians of insane persons are, like guardians of minors,⁷ restricted to the income of their wards in their expenditures for and on account of the lunatic, so that they have no authority, without the permission of the court, to expend a sum in excess of the annual

¹ *Hinchman v. Ballard*, 7 W. Va. 152, 180 *et seq.*

² *Post*, § 148.

³ *Howard v. Thompson*, 8 Ired. L. 367; *Harriss v. Richardson*, 4 Dev. L. 279.

⁴ *Holden v. Scudder*, 58 Fed. 932, citing *Strong v. Strauss*, 40 Oh. St. 87, which, however, is the case of a minor.

⁵ *Ellis v. Essex*, 2 Pick. 243, 245; *Wal-*

lace v. Holmes, 9 Blatchf. 65, 69; see 120 Mass. 102.

⁶ "Of the personalty, he [the conservator] has the entire disposition; but over real estate he has no power, unless it is conferred on him by the court;" *Griswold v. Butler*, 3 Conn. 227, 231.

⁷ See *ante*, § 50.

income of the ward's estate.¹ Accidental expenditures, made necessary by an emergency, — sickness, for instance, — when the excess of expenditure in one year may be compensated for by drawing on the income of the next year or two, constitute an exception.² And courts sometimes sanction disbursements out of the *corpus* of an estate, made without a previous order of court, if found reasonable and necessary in the interest of the ward, and such subsequent sanction is held equivalent to a previous order.³

but the income may be anticipated, or the expenditure sanctioned by court.

The extent of allowance to be made by the court, and what may or may not be proper to be allowed, addresses itself to the discretion of the court, keeping in view solely the health, comfort, and advantage of the lunatic himself, without regard to the eventual interests of the next of kin or heirs.⁴ It has already appeared⁵ that the law will imply a contract in favor of the vendor of necessaries to an insane person or his family, and the plaintiff has an action for his claim at law.⁶ And the word "necessaries," as applied to an insane person, is not to be construed as limited to articles of prime necessity, but to include everything advantageous and proper for the insane person's condition.⁷ It was held in South Carolina, however, that the capacity of one *non compos mentis* to bind himself is restricted by the reasons which authorize it to his personal wants — such as food, clothing, and such other things as are necessary for the comfortable subsistence of himself and family; and that a horse, though necessary to carry on the operations of a farm held for the defendant by a trustee who had died, and for whom no successor had been appointed, did not come under the description of necessaries.⁸

Extent and purpose of allowance are within the discretion of the court.

One furnishing necessaries has an action therefor.

Necessaries are all things advantageous and proper for the ward.

With respect to the investment of funds belonging to the estate of an insane person, there is little, if any, difference between the

¹ Patton v. Thompson, 2 Jones Eq. 411; Kennedy v. Johnston, 65 Pa. St. 451, 455.

² Patton v. Thompson, *supra*, p. 413.

³ Frankenfield's Appeal, 102 Pa. St. 589. See on this point, *post*, § 153.

⁴ See *ante*, § 138, and authorities there cited.

⁵ *Ante*, § 141.

⁶ Tally v. Tally, 2 Dev. & B. Eq. 385, 387; Barnes v. Hathaway, 66 Barb. 452, 456.

⁷ La Rue v. Gilkyson, 4 Pa. St. 375, 376, citing Baxter v. Earl of Portsmouth, 5 B. & C. 170.

⁸ Munday v. Mims, 5 Strobb. L. 132.

Duty of guardians in investing funds are the same as of guardians of minors,

law applicable to guardians of minors,¹ and that applicable to guardians or committees of persons of unsound mind. The same duties are required of, and the same powers granted to the latter, as are required of and granted to the former, *mutatis mutandis*.² The just and true rule applicable to the liability of the committee or guardian of an insane person, touching the investment of the lunatic's funds, as

or of all other trustees.

adopted in New York, is that applicable to all trustees, who are bound to employ such diligence and such prudence in the care and management as in general prudent men of discretion and intelligence in such matters employ in their own affairs. The preservation of the fund, and the procurement of a just income therefrom, are primary objects in the creation of the trust itself, and are to be primarily regarded.³

In Iowa the law inhibits the investment of money by the guardian of an insane person in behalf of his ward without the direction of the court given before the investment is made;⁴ hence, it is the duty of the successor to the former guardian of an imbecile to call in a loan made by the former guardian which had not been ordered by the court, and, failing to do so, he makes himself liable for any loss by reason of his negligence.⁵

In deciding upon the question, whether it is to the ward's interest to bring an action to set aside a conveyance made by him on the ground of insanity, the guardian should bear in mind the well-established principle, that such a conveyance or contract will be set aside only if the insane person has been overreached or defrauded in the transaction by one who was aware, and took advantage, of the lunatic's condition; and that before a conveyance can be avoided as against a purchaser in good faith for a sufficient consideration, without knowledge of the insanity, the consideration must be returned and the purchaser reimbursed for all his outlays.⁶

Contracts of insane persons will not be set aside, unless the consideration be returned.

¹ As to which see *ante*, § 63.

² *Stumph v. Pfeiffer*, 58 Ind. 472.

³ *Bush's Estate*, 30 N. Y. Supp. 171, 174, adopting the language in which Woodruff, J., couched the rule in the case of *King v. Talbot*, 40 N. Y. 76, 85 (in the case of a guardian of minors). To same

effect: *Harding v. Larned*, 4 Allen, 426; *Butler v. Jarvis*, 51 Hun, 248, 256 *et seq.*

⁴ *Garner v. Hendry*, 63 N. W. (Iowa), 359.

⁵ *Garner v. Hendry*, *supra*.

⁶ *Scanlan v. Cobb*, 85 Ill. 296, 299, citing English and American authorities.

And it is also well settled that one having obtained a deed in violation of good faith, and in fraud of a lunatic's rights, is held in equity as his trustee, and is liable as such to account for any breach of the trust.¹ So an equitable wardship arises where one takes charge of the affairs of another, in the belief that the latter is incompetent to manage them, and who passively submits.² In such cases a presumption arises against the justice of any bargain made by one in the position of the guardian; the *onus* will be on him to show that the transaction was fair, and for the other's interest.³

Grantee in fraud holds the property as the lunatic's trustee.

In a case of equitable wardship, presumption is against the justice of any bargain.

§ 148. **Sale and Mortgage of Real Estate of Persons of Unsound Mind.** — At common law, as heretofore stated,⁴ insane persons were liable in actions at law for their debts, and their committees, appointed by the Chancellor, and being the mere bailiffs of the court, were not answerable. Hence, the Chancellor had not, either in his prerogative capacity, or by virtue of his jurisdiction in lunacy, the power to order the sale of a lunatic's real estate for the payment of his debts, until authority was vested in him for that purpose by statute.⁵ And so it was held in the United States, that, in the absence of statutory authority, chancery courts had no power to direct the sale of real estate of insane persons.⁶ In some States, however, this power was early exercised by chancery courts;⁷ and has been vindicated, as an imperious necessity, independent of statutory grant, on fundamental principles deduced from the essential nature of property and the functions of courts.⁸ But in perhaps all of the States the jurisdiction is now vested in chancery courts, or in other courts having jurisdiction in lunacy, either by statute,⁹ or by the constitution.¹⁰ So, for instance, the

No power in chancery to order sale of real estate to pay debts at common law;

but such power was early exercised in America.

Statutory power in all States,

¹ *Long v. Fox*, 100 Ill. 43, 50.

² *Jacox v. Jacox*, 40 Mich. 473, 480; *Bowe v. Bowe*, 42 Mich. 195.

³ *Jacox v. Jacox*, *supra*; *Bowe v. Bowe*, *supra*.

⁴ *Ante*, § 140.

⁵ 43 Geo. III. c. 75.

⁶ *Berry v. Rogers*, 2 B. Mon. 308; *Latham v. Wiswall*, 2 Ired. Eq. 294, 299.

⁷ *Ex parte Drayton*, 1 Desaus. 116, 136.

⁸ See exhaustive argument by Justice

Mulkey, speaking for the Supreme Court of Illinois in *Dodge v. Cole*, 97 Ill. 338, 350 *et seq.*

⁹ In many instances the statutes give to courts the same authority to sell the real estate of insane persons, and require the same, or similar course of procedure in such cases, as is enacted for the sale of the real estate of minors.

¹⁰ As, for instance, in Pennsylvania: *Matter of Eckstein*, 1 Pars. Sel. C. 59.

at discretion of court. statute confers authority to sell the lunatic's real estate at the discretion of the court in Delaware,¹ and North Carolina;² the court may require bond for the faithful application of the proceeds in Connecticut,³ and Florida;⁴ may order the sale in like cases and with like effect as in cases of the estates of deceased persons in Colorado,⁵ and Kentucky;⁶ or as in cases of minors in Ohio,⁷ etc. In all these and other States in which such power is given by statute, it exists for the purpose of raising funds for the payment of debts, if the personal property of the lunatic is insufficient; and for the support and comfortable maintenance of the lunatic and his family, if he have any, and the education of his children. A general grant of power "to make such orders and decrees respecting the persons and estates of a lunatic as the court may deem proper," is held sufficient, without more, to authorize the sale of real estate, by order of court, for the lunatic's support and the payment of all reasonable expenses which the trustee (or guardian) may have incurred; but where further provisions direct how and in what manner the power should be exercised, these safeguards must be observed in cases where a creditor seeks to collect his debt, or enforce a lien.⁸ Under the statutory provisions mentioned, while no notice is held necessary to obtain an order of sale of real estate for the payment of necessary expenses incurred by the trustee for the support and maintenance of the lunatic, it is nevertheless necessary to give jurisdiction to the court for an order to sell such real estate for the purpose of better investment, that the requirements of the statute be strictly complied with.⁹ It has already been mentioned that the deed of a person under guardianship, as being of unsound mind, is void, even though made with the approbation of his guardian, unless ordered by a court under statutory authority.¹⁰

¹ Rev. Code, 1874, ch. xlix. § 4.

² Code, 1883, § 1674.

³ Gen. St. 1888, § 479.

⁴ Rev. St. 1892, § 2111.

⁵ Mills' Ann. St. 1891, § 2947.

⁶ St. 1894, § 2150.

⁷ Rev. St. 1890, § 6306.

⁸ Estate of Dorney, 59 Md. 67, Matter of Brent, 5 Mackey (16 D. C.), 352.

⁹ Willis v. Hodson, 79 Md. 327, 330.

¹⁰ See also *ante*, § 129.

Notice of application for an order to sell the real estate of an insane person, on any of the grounds mentioned in the statute as authorizing such sale, is in some States required to be given to the husband or wife, if any, or the next of kin of the lunatic, or the lunatic himself.

Notice to be given to husband or wife, or next of kin.

Where such notice is required by statute to be given, it must appear on the face of the petition that it has been given, or the court will not have jurisdiction to order the sale; and such want of jurisdiction may be set up in ejectment by such wife or next of kin to show the invalidity of the sale.¹ But in the absence of statutory requirement no notice is necessary to the lunatic himself.²

Proof of notice given is a jurisdictional prerequisite,

if so required by statute.

And it has been held, in a State where such notice is required to be published in a newspaper and to be personally served "on all persons interested in the estate and residing in the county," — unless they signify their assent in writing, — that such notice was intended only for the protection of persons having adverse interests in the property, and is not essential to the jurisdiction of the court.³ The statutory requirement of notice for three successive weeks, the first insertion to be at least thirty days before the day of sale, is satisfied by a publication once a week for four consecutive weeks, commencing at the required time before the sale.⁴

Notice is necessary for the protection of parties in interest.

There is no power, in the absence of statutory authorization, to sell the real estate of an insane person, except for the purpose of paying his debts, or supporting him and his family if the personal estate is insufficient for that purpose.⁵ Nor will the law permit the property of a lunatic to be applied to the payment of his debts, unless a sufficient part thereof has been retained for the support of himself, his wife,

No power to sell real estate of lunatic, except to pay debts and for support where personalty is insufficient.

Property necessary for support exempt from sale,

¹ *Bennett v. Hayden*, 145 Pa. St. 586, 594 *et seq.*

² The effect of the appointment of the committee is said to divest the lunatic of the custody and control of his property, and to place it at the disposal of the court. The committee is the person upon whom all notices intended for the lunatic, or affecting his rights of property, are required to be served; and in applying for leave to dispose of the property of the lunatic, he represents that person, and is

not required to give notice to him: *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525, 532. To same effect: *Dodge v. Cole*, 97 Ill. 338, 351.

³ *Mohr v. Manierre*, 101 U. S. 417, 420, overruling the Supreme Court of Wisconsin on this point.

⁴ The notice, though in a daily paper, need not be published daily: *Wing v. Dodge*, 80 Ill. 564.

⁵ *Matter of Pettit*, 2 Paige, 596; *Matter of Hoag*, 7 Paige, 312, 315.

and infant children;¹ hence, the court will not order the sale of real estate, if such sale would reduce the lunatic to a condition of want;² but when the lunatic dies, his property goes to his personal representative, and on his recovery it goes to himself, and will, in either of these cases, be liable to creditors as in other cases of individual indebtedness.³

But it was held in Kentucky that his restoration by second inquest does not divest the court having ordered the sale of his real estate of its jurisdiction of the proceedings commenced by his committee under the first inquest.⁴

The guardian or committee of an insane person can sell only such right to or interest in his real estate as his ward possesses;⁵

the purchaser takes subject to all outstanding liens and incumbrances thereon; a bond executed by the committee, conditioned to remove such liens, does not bind the estate.⁶ So a guardian, whether of an infant or an insane person, is said to be incapable of granting an easement out of his ward's estate.⁷

The purchase money arising from the sale of a lunatic's real estate constitutes a fund in the hands of the committee

applicable, in the first instance, to the specific purpose for which it was raised; the committee, being the receiver of the court as to the residue, holds it in

trust for those to whom it would belong if the property had not been sold, subject to the orders of the

court;⁸ and when an order of sale has been made upon the petition of a lunatic's guardian by a court having competent jurisdiction to make such order, no creditor can seize any portion of the

property under execution against the lunatic of date subsequent to the date of the decree; the court will enjoin creditors from interfering with it except under its own direction; nor can a purchaser obtain title to the property,

¹ See *ante*, § 138.

² *McLean v. Breese*, 109 N. C. 564, 566; *Adams v. Thomas*, 81 N. C. 296.

³ *Ex parte Latham*, 6 Ired. Eq. 406; *McLean v. Breese*, 113 N. C. 390.

⁴ *Salter v. Salter*, 6 Bush, 624, 631.

⁵ *Rannells v. Gerner*, 80 Mo. 474, 482.

⁶ Such covenants, if inserted in the

deed of the committee, will bind the guardian personally, and not the estate he represents: *Person v. Merrick*, 5 Wis. 231, 239.

⁷ *Watkins v. Peck*, 13 N. H. 360, 377.

⁸ *Wheatland's Appeal*, 125 Pa. St. 38, 46; *Lloyd v. Hart*, 2 Pa. St. 473.

so as to defeat the disposition thereof by the Court of Equity, at a sale under the execution sued out by the creditor after the decree, but before the injunction was obtained.¹ Hence, the death of the lunatic, pending the distribution of such fund, does not stay or alter the proceeding.² It is a well established principle of law that property of a lunatic converted in the hands of his guardian or committee retains its original character in respect of the rights of heirs or distributees to the succession;³ and in many States this principle is announced by statutory enactment,⁴ following the English statute in this particular.⁵ But the receipt of the purchase money, by the lunatic's committee, of the lunatic's interest in real estate illegally sold by the sheriff, does not estop a later committee from recovering possession of such property, notwithstanding that valuable improvements had been made thereon since the sale.⁶ Nor does the reluctance of courts to interfere with the succession of the ward's property militate against the paramount principle that the ward's welfare is the ruling consideration in the administration of his property; courts will not hesitate to authorize the conversion of real into personal property, or *vice versa*, if the ward's interest is thereby enhanced. Thus the court may direct timber on the lunatic's land to be sold;⁷ the real estate to be kept in repair out of the personal estate,⁸ or to be improved by using the personalty.⁹ In many States statutes authorize the conversion of real into personal, or of personal into real estate, if found by the court to be desirable and for the best interest of the insane person.¹⁰ In New Hampshire the Probate Court may authorize the guardian of a lunatic to purchase a homestead for the use of the lunatic and his family.¹¹ The proceeds of real estate of a person

Sale does not change original character of estate as to heirs and distributees.

Ward's interest is the paramount consideration.

Conversion of real or personal property

authorized by statute.

Purchase of homestead authorized.

¹ Latham v. Wiswall, 2 Ired. Eq. 294, 301.

² Wheatland's Appeal, *supra*.

³ Ford v. Livingston, 140 N. Y. 162, 167; Walrath v. Abbott, 75 Hun, 445, 450; Matter of Guarino, 35 N. Y. Supp. 409 (award made for land taken in condemnation proceedings).

⁴ See New York and Pennsylvania cases, *supra*.

⁵ 1 Wm. IV. c. 65, §§ 21, 29.

⁶ Warden v. Eichbaum, 14 Pa. St. 121, 125.

⁷ Matter of Salisbury, 3 Johns. Ch. 347, citing English precedents.

⁸ Matter of Babcock, 4 Myl. & C. 440.

⁹ Matter of Livingston, 9 Paige, 440.

¹⁰ See, for instance, Rev. St. of Missouri, 1889, § 5537, authorizing such conversion for re-investment under the same conditions and after similar proceedings as are provided for the sale of the property of minors for re-investment.

¹¹ Publ. St. 1891, ch. 179, § 11.

Proceeds of
real estate sold
in partition
held person-
ally. of unsound mind, not declared so on commission, but for whom a guardian *ad litem* had been appointed, sold in a suit for partition, was held to be personal property in the hands of the court and ordered to be paid, after her death, to the insane person's administrator.¹

Petition must
show facts and
purpose under
the statute. The petition of a conservator or guardian of an insane person for leave to sell the ward's real estate must show the facts and specify the purpose for which the sale is sought, and these must be for one or more of the objects named in the statute.² But the record need not show whether

the debts, for the payment of which the sale is prayed, were incurred by the lunatic while sane, or whether they were the expenses for support during the guardianship.³ The affidavit of the trustee or guardian is sufficient to warrant the order.⁴ The provisions of the statute for the disposition of the real estate of insane persons are exclusive of all other methods. The proceedings are *in rem*, binding no one save so far as they divest the lunatic owner of his land; the deed of the guardian does but convey the right, title, and interest of his ward in the land, and can convey no more.⁵

Sales of real estate made by guardians or committees of insane persons are invalid, unless it has been ordered and approved or confirmed by the court. The assent of a conservator to a deed of real estate made by his ward imparts no validity to the instrument.⁶ So the sheriff's sale of a lunatic's real estate under an execution issued on a judgment against the guardian is void in a State where the statute provides for the sale of the lunatic's real estate for the payment of his debts incurred while sane, by order of the Probate Court, in the same manner as lands of a deceased person are sold for the payment of his debts.⁷

Where a private sale of a lunatic's land, made in the absence of any irregularity, fraud, mistake, or legal surprise, has been

¹ Smith v. Bayright, 34 N. J. Eq. 424.

² Wing v. Dodge, 80 Ill. 564. The payment of taxes due on the land is one of the liabilities which the guardian is bound to pay: Estate of Dorney, 59 Md. 67.

³ Smith v. Burnham, 1 Aik. 84, 94.

⁴ Estate of Dorney, 59 Md. 67, 72.

⁵ Rannells v. Gerner, 80 Mo. 474, 482.

⁶ Griswold v. Butler, 3 Conn. 227, 231; Rannells v. Gerner, 80 Mo. 474, 479; Funk v. Rentschler, 134 Ind. 68, 72. But see, apparently to the contrary, Williston v. White, 11 Vt. 40.

⁷ Saunders v. Mitchell, 61 Miss. 321, 325.

approved by the court, it will not be set aside in chancery merely because another person has made an offer for the land exceeding by six per cent. the price produced at the guardian's sale.¹ And where the statutory prerequisites have been observed, a chancery court may order the sale of a lunatic's lands to parties bidding therefor, and confer a good title to all of the lunatic's interest therein.² But where, in consequence of an unlawful combination between the committee and the purchaser, the property of the lunatic is sold at a sacrifice, a court of equity will set aside the sale.³ In a suit by the committee of a lunatic to set aside the sale made by a former committee, undue haste attending the sale, and hurried subsequent proceedings relating to it, readily create suspicion.⁴

Sale good, in equity, though better bid was made,

unless there was collusion.

The power to mortgage the real estate of insane persons is dealt with in much the same manner as the power to sell the same. It is conferred by statute, usually together with the power to sell, and subject to the same conditions and rules of procedure.⁵ But in New York it is held that the requirement of the statute touching the report of a sale on the oath of the committee and confirmation by the court, does not apply to a mortgage; and that the giving of a bond by the committee, made essential in the case of a sale, is discretionary with the court in case of a mortgage;⁶ nor is it necessary, in case of a petition for an order to sell or mortgage real estate for the payment of debts, that notice be given to the insane person.⁷

Power to mortgage same as power to sell.

The sale of real estate by the guardian of an insane person who was appointed on the strength of an inquisition found to be void for the want of notice to the alleged lunatic, is held, of course, to be void.⁸ Yet a possession under a conveyance made by the guardian in conformity to the decree of the Probate Court for the sale of the land is supported by color of title, and is adverse, so as to be protected by the statute of limitations.⁹

Sale under void inquisition void,

but purchaser's holding under such sale is with color of title.

¹ Leary's Case, 50 N. J. Eq. 383.

² Palmer v. Garland, 81 Va. 444, 449.

³ Stone v. Cromie, 87 Ky. 173, 180.

⁴ Stone v. Cromie, *supra*.

⁵ See, for instance, Rev. St. Mo. 1889, §§ 5532, 5534, 5536; Gen. St. Conn. 1888, § 483.

⁶ Agricultural Co. v. Barnard, 96 N. Y. 525, 533.

⁷ Agricultural Co. v. Barnard, 96 N. Y. 525, affirming same case in 26 Hun, 302.

⁸ Imhoff v. Witmer, 31 Pa. St. 243.

⁹ Molton v. Henderson, 62 Ala. 426, 430.

Ward cannot
sue to impeach
guardian's
sale.

A person under guardianship as of unsound mind cannot impeach the sale of his real estate by his guardian.¹

§ 149. **Dower affected by the Insanity of Husband or Wife.** — It is evident, as heretofore pointed out, that a deed attempting the conveyance of real estate by an insane person under guardianship, even if made under sanction of the guardian, is a nullity, and can impart no validity to any legal or business transaction depending on such party's conveyance.² From this it follows, that under a statute

Wife of an
insane hus-
band can relin-
quish dower
only in the
mode pointed
out by statute.

authorizing the wife to relinquish dower in her husband's real estate in no other way than by "joint deed" with her husband, "acknowledged and certified," the wife of an insane person does not relinquish her dower in the land of her husband, sold by his guardian, by joining with her husband in signing the deed thereto, because such deed, so far as its execution by the husband goes, has no legal vitality or existence; nor is such wife precluded by the doctrine of estoppel *in pais*, which is applicable to married women only with regard to their separate estates.³ For the same reason, the deed by an insane husband and his wife, made during the husband's insanity, is absolutely void and ineffectual to convey the wife's land, where the husband's assent to his wife's conveyance is necessary.⁴

An insane wife cannot, of course, relinquish her dower right in her husband's real estate; nor will courts, in the absence of statutory provisions, assist the husband in such case to disencumber his lands from his wife's inchoate dower.⁵ The guardian has no power to relinquish his insane ward's dower right without statutory authorization;⁶ nor has the Chancellor power, by electing for her, to deprive a widow of the legal right in her husband's estate, where it is clear that the devise to her was not in lieu of dower.⁷

An insane widow is equally incompetent to exercise her right of

¹ Robeson v. Martin, 93 Ind. 420.

² Ante, § 129.

³ Rannells v. Gerner, 80 Mo. 474, 482, reviewing the authorities and overruling the Court of Appeals, which held that the wife of an insane husband may relinquish her dower by joining in a deed executed

by his guardian under order of court: Rannells v. Gerner, 9 Mo. App. 506.

⁴ Leggate v. Clark, 111 Mass. 308.

⁵ Eslava v. Lepretre, 21 Ala. 504, 529; *Ex parte McElwain*, 29 Ill. 442.

⁶ Eslava v. Lepretre, *supra*.

⁷ Newcomb v. Newcomb, 13 Bush, 544, 578.

election, where such right or duty is vested in her for any purpose.¹ So where property passes under a will, subject to the right of election in the devisee to take it as real estate, or as money, such election cannot be made by an insane devisee, nor is there room for the presumption that she would have elected to take in the shape most advantageous to her.² Neither the insane widow while living, nor her administrator after her death, can elect between a devise in her favor and her share in the husband's estate on renouncing the devise.³ Nor can the guardian or committee exercise the right to elect for her, in the absence of statutory authority to such effect.⁴

Insane widow cannot elect;

nor an insane devisee;

nor insane widow's administrator

or guardian.

In some of the States the court having lunacy jurisdiction, or a court of equity, may allow a widow, who has not dissented from her husband's will within the time prescribed by the law, because of her insanity, to claim her rights in her husband's estate as though she had dissented,⁵ or will make election for her.⁶

Election by the court.

The matter of relinquishing dower, and electing between dower and devise, is now regulated by statute in many of the States, among which may be named Alabama,⁷ Connecticut,⁸ Florida,⁹ Illinois,¹⁰ Indiana,¹¹ Kentucky,¹² Massachusetts,¹³ Missouri,¹⁴ North Carolina,¹⁵ Ohio,¹⁶ Vir-

Statutory provisions for election by insane widow.

¹ Woerner on Adm., § 119, pp. 270, 271, and cases cited.

² Ashby v. Palmer, 1 Meriv. 296, 300; Matter of Wharton, 5 De G. M. & G. 83.

³ Collins v. Carman, 5 Md. 503, 527.

⁴ Lewis v. Lewis, 7 Ired. L. 72; Kennedy v. Johnston, 65 Pa. St. 451, 454; Heavenridge v. Nelson, 56 Ind. 90, 93; Pinkerton v. Sergeant, 102 Mass. 568.

⁵ So, for instance, in Tennessee: Wright v. West, 2 Lea, 78 (Freeman, J., dissenting, holding that election may be made for the insane widow by a chancery court, but only within the period fixed by statute, p. 86).

⁶ As in Pennsylvania: Kennedy v. Johnston, 65 Pa. St. 451, 455.

⁷ Code, 1886, §§ 1896-1898, providing for the method of proving wife's insanity, notice to guardian, if any, and appoint-

ment of guardian *ad litem*, and admeasuring and securing to the widow the value of her dower estate. § 1965 also provides how the dissent of an insane widow to her husband's will may be established.

⁸ Gen. St. 1887, § 486, enabling the wife of an insane husband to convey her real estate by order of the Probate Court.

⁹ Rev. St. 1892, §§ 1960-1963.

¹⁰ Rev. St. 1889, ch. 68, §§ 17, 18.

¹¹ Hallett v. Hallett, 8 Ind. App. 305, 309.

¹² St. 1894, § 2145.

¹³ Publ. St. 1882, ch. 147, §§ 20-25.

¹⁴ Rev. St. 1889, §§ 4564-4568.

¹⁵ Code, 1883, § 1687, authorizing the clerk of the Superior Court to order the sale of the real estate of a lunatic's wife, on her petition, joined in by his guardian.

¹⁶ Rev. St. 1890, §§ 5721, 5722, 5725, also § 6307.

ginia,¹ and Wisconsin.² In Maine the waiver by an insane widow, confirmed by her guardian, of a provision made for her in her husband's will, who at no lucid interval evinced a disposition to avoid the waiver, cannot be objected to as inoperative.³

¹ Code, 1873, p. 933, § 11.

³ *Brown v. Hodgdon*, 31 Me. 65.

² Sanb. & B. Ann. St. 1889, §§ 2225, 2226.

TITLE SEVENTH.

OF THE CLOSE OF THE GUARDIANSHIP.

CHAPTER XX.

OF THE TERMINATION OF THE GUARDIANSHIP AND PERIODICAL AND FINAL ACCOUNTING.

§ 150. **Events terminating Guardianship.** — It appears from the discussion of the subject of the *supersedeas*,¹ that on proof of restoration to reason of a lunatic, or of the reformation of a drunkard or spendthrift, guardianship becomes unnecessary, and that in such case the court will restore such person to his condition *sui juris*, and, generally, order the committee or guardian to deliver and pay to him all money and other property of the ward which he may have in hand, or to which the ward may be entitled. After the expiration of the guardianship, the court has no further jurisdiction over the guardian or committee than to compel accounting, and to discharge the guardian or committee on proof of his having made final settlement.

Guardianship is terminated on judicial ascertainment of restoration or reform.

The guardianship also terminates with the death of the lunatic; and the only power which chancery retains over the committee in such case is, as in case of the termination of the guardianship by the restoration of the ward, to compel accounting and the delivery of the property as the court may direct.² And it is the duty of the committee to retain possession of the property and preserve it from injury until some person shall appear properly authorized to receive it from him.³ The court

Also at death of lunatic.

¹ *Ante*, § 130.

² *Matter of Colvin*, 3 Md. Ch. 278, 288; *Shepherd v. Newkirk*, 20 N. J. L. 343, 345. See also *post*, p. 510, note (5).

³ *Matter of Colvin*, *supra*; *Boarman's Case*, 2 Bland Ch. 89, 98; *Guerard v. Gailard*, 15 Rich. L. 22, 25. After the death of the ward, the guardian has no further

Property in such case must be turned over to personal representative of deceased. has no power to adjust the claims of creditors of the lunatic to the estate left by him;¹ but will direct the personal estate to be turned over to the personal representatives of the deceased.² Death of the lun-

Death of lunatic bars *supersedeas*, but not traverse. atic is a bar to a *supersedeas* of the commission on the ground of recovery, but not to a traverse of the inquisition.³ The committee may, however, be ap-

pointed such representative, and is made so by statute in Georgia.⁴

In a case where the administrator of the deceased lunatic was the attorney in fact of his committee, and the accountant, the

Accounting may be to heirs, to save expense. heirs of the lunatic were allowed to appear to except to the account, in order to avoid the enormous expense of a proceeding by bill in equity to accomplish the

same result.⁵ So it has been held that whether or not a suit at law brought against the committee of a lunatic, who dies before trial, can be revived against the lunatic's administrators, yet if they appear by counsel and go to trial on the issue, they will not be heard to object in the Appellate Court, that the suit ought not to have been revived against them.⁶ In England and Ireland it has been held that where a lunatic died after reference to ascertain the nature and amount of his property, and before the master's report, the Chancellor has jurisdiction to direct the reference to be proceeded with notwithstanding the lunatic's death.⁷ But a petition in lunacy matters after the lunatic is dead ought to contain a statement of that fact.⁸

In case of the appointment of a guardian for an insane person void for the want of notice, the remedy is not by injunction, but by revocation of the appointment under the statutory power to that effect vested in the court.⁹

The official capacity of the committee or guardian of an insane person may also be terminated by his removal from office. The power to remove committees or guardians for

authority or control over the personal estate remaining except to safely keep it; the assets vest immediately in the administrator, and he, and not the guardian, is the proper person to list the personal estate for taxation: *Sommers v. Boyd*, 48 Oh. St. 648, 658.

¹ *Boarman's Case* 2 Bland Ch. 89, 98.

² *Ex parte Latham*, 6 Ired. Eq. 406; *Cain v. Warford*, 3 Md. 454, 462.

³ *Owens, in re*, 18 N. Y. Supp. 850.

⁴ *Jefferson v. Bowers*, 33 Ga. 452.

⁵ *Vinson v. Vinson*, 1 Del. Ch. 120; see *Matter of Rowles*, 15 Ir. Ch. 562.

⁶ *Paradise v. Cole*, 6 Munf. 218.

⁷ *Matter of Singleton*, 8 Ir. Ch. 263; *Ex parte Armstrong*, 3 Bro. C. C. 237.

⁸ *Matter of Briscoe*, 2 Dru. & W. 501.

⁹ *Lance v. McCoy*, 34 W. Va. 416, 419.

cause is an inherent element of chancery jurisdiction;¹ and will be exercised where the committee refuses to answer in an action against his ward,² or is in contempt of the court,³ or fails to pass his account,⁴ or is addicted to habitual intemperance,⁵ or otherwise guilty of misconduct in office.⁶ Bankruptcy has been held sufficient ground for the removal of a committee of the estate of a lunatic;⁷ but although bankruptcy is a circumstance demanding particular attention, the court will not remove the committee of the person merely because he is a bankrupt, whether he has received his certificate or not,⁸ nor, necessarily, change the custody of the lunatic, though his committee be removed.⁹ So the mere fact of insolvency is no ground for removal.¹⁰ Where lunacy jurisdiction is vested in probate courts, or other courts of law, similar power to revoke the authority of guardians appointed by them of the persons or estates of lunatics, is generally vested in them by statute.¹¹ The cause for such removal is usually stated to be neglect of duty, misconduct, or mismanagement, or disobedience to lawful orders of the court, and some such cause must be alleged;¹² but the powers of chancery are not restricted to the causes enumerated by statute for the inferior courts. Thus the unfounded prejudice of a lunatic against his committee, which would not fall within the statutory rule for removing guardians, may be ground for the interposition of the Chancellor.¹³ The court has no statutory power to rescind

Guardianship terminated by removal from office.

Reasons for removing in chancery.

Causes for removal by probate court.

Chancery not confined to statutory causes.

¹ *Matter of Griffin*, 5 Abb. Pr., N. S., 96, holding that such power vested wholly in discretion, and is not reviewable on appeal; to same effect: *Black's Case*, 18 Pa. St. 434. In a later Pennsylvania case it is expressly left undecided whether the refusal to order the removal of such a guardian is reviewable: *Dean's Appeal*, 90 Pa. St. 106, 110.

² *Lloyd, Plaintiff*, 2 Dick. 460 (cited by Shelford as *Lloyd v. Mar*, p. 107).

³ *Ex parte Jones*, 13 Ves. 237.

⁴ *Matter of Lockey*, 1 Phillips, 508, 509.

⁵ *Kettletas v. Gardner*, 1 Paige, 488.

⁶ *Matter of Fitzgerald*, 2 Sch. & Lefr. 434, 436. Where a guardian has permitted his lunatic ward to wander into another State, and makes no effort to

recover his ward, and for ten years does not see her, it is error to sustain a demurrer to a petition praying for an account and the removal of such guardian: *Watt v. Allgood*, 62 Miss. 38, 42.

⁷ Shelf. on Lun., citing *Barrows, in re* p. 169, 170.

⁸ *Ex parte Proctor*, 1 Swanston, 531, 532.

⁹ *Ex parte Mildmay*, 3 Ves. Jr. 2.

¹⁰ *Estate of Chew*, 4 Md. Ch. 60.

¹¹ For instance, in Arkansas: Dig. 1894, § 3855; Kansas: Gen. St. 1889, § 3716; Missouri: Rev. St. 1889, § 5552; New Hampshire: *Pettes v. Upham*, 59 N. H. 149, and probably most other States.

¹² *Jacobs v. Smith*, 32 S. W. (Ky.) 394.

¹³ *Black's Case*, 18 Pa. St. 434, 438.

the appointment of a temporary administrator of an interdict without good legal cause,¹ nor to summarily remove a guardian without trial, evidence, or cause shown.²

The right to terminate the guardianship over a lunatic by resignation does not seem to have existed, at common law,³ but is generally conceded in the United States,⁴ if he show some valid reason for declining the trust.⁵ The matter is regulated by statute in some States,⁶ and Shelford mentions that a party may apply to the Lord Chancellor by petition to be discharged from the office of committee; whereupon the same will be referred to the master to take and pass his accounts, and on adjustment thereof the committee may be discharged and the recognizance entered into by him and his sureties cancelled.⁷

Termination of
guardianship
by resignation.

Probate Court
may compel
accounting by
representative
of deceased
guardian.

Death of one
joint guardian
determines
guardianship
of both.

interest.⁹

Where the selectmen of a town have been appointed guardians to a spendthrift, under a statute authorizing the judge of probate to appoint the selectmen, "or other suitable persons," they do not cease to be such guardians on the expiration of the period for which they were elected to the office of selectmen.¹⁰

Guardianship
of a selectman
does not termi-
nate with his
office as
selectman.

¹ State v. Judge, 18 La. An. 523.

² Ward v. Angevine, 46 Ind. 415, 422.

³ Evans v. Johnson, 39 W. Va. 299, 306.

⁴ Busw. Ins. § 99; Morgan's Case, 3 Bland Ch. 332, 333, 334.

⁵ Matter of Lytle, 3 Paige, 251, 252.

⁶ For instance, in Colorado: Mills' St. 1891, § 2955, providing that the resignation does not discharge the guardian; Missouri: Rev. St. 1889, § 5563.

⁷ Shelf. Lun. 170.

⁸ Waterman v. Wright, 36 Vt. 164,

168, holding that it is no excuse to such representative that she has no means of rendering an account or aiding in a settlement.

⁹ *Ex parte* Lyne, Cas. Temp. Talbot, 143 (the deceased committee in this case having been the wife of her co-committee); *Ex parte* Clark, 4 Cond. Ch. Rep. 276, 279; Boarman's Case, 2 Bland Ch. 89, 95.

¹⁰ Russell v. Coffin, 8 Pickering, 143, 148.

§ 151. **Periodical Accounting by Guardians of Insane Persons.** — In England, and in chancery courts of the United States, committees, conservators, trustees, etc., of insane persons are liable to account, like trustees in other capacities, whenever thereto required by general or special order of the court. By an order in chancery in England it was made the duty of all masters in chancery to certify, annually, to the Lord Chancellor, Lord Keeper, or Lord Commissioners for the custody of the Great Seal for the time being, the state of the several committees' and receivers' accounts in their respective offices.¹ For failure of the committee to pass his accounts regularly, though there was no fraud, the committee was refused costs;² and the Lord Chancellor refused to pass the account of a committee without referring it to the master to see what sums of money he had in his hands from time to time.³ The next of kin of a lunatic were notified and permitted to appear (and have costs allowed) at the accounting before the master; not by virtue of any right by which they can claim to be entitled in respect of their contingent possibilities, but for the protection of the court, and to assist the court in watching over the interests of the lunatic.⁴ In very small estates, where the expense of accounting would exceed the surplus remaining after the payment of the annual allowance for maintenance, the annual accounting is sometimes dispensed with;⁵ but an application to the court in the first instance is required whenever, for any reason, it is deemed inexpedient to pass the accounts of a lunatic's estate regularly; and the matter remains in the discretion of the court.⁶

Guardians
accounting as
trustees.

Duty to pass
accounts under
order of
English Chan-
cery Court.

Next of kin
allowed to be
present at the
accounting.

Annual ac-
counting dis-
pensed with in
small estates.

In England committees of lunatics are not usually required to account for an unexpended balance of the allowance ordered by the court for his maintenance.⁷ In the case of *Sheldon v. Fortes-*

¹ Beames' Orders in Chancery, p. 453.

² *Ex parte* Clarke, 1 Ves. Jr. 296.

³ *Ex parte* Catton, 1 Ves. Jr. 156.

⁴ *Tharp v. Tharp*, 3 Meriv. 510, 511; and see cases cited in Shelford on Lunacy, 175.

⁵ *Ex parte* Pickard, 3 Ves. & B. 127.

⁶ Anon., 1 Russ. & M. 113; *Boarman's Case*, 2 Bland Ch. 89, 90, citing English cases in a note.

⁷ In the case of *Grosvenor v. Drax*, reported in 2 Knapp, 82, an order of the Lord Chancellor was appealed from, by which the master was directed to inquire and certify what had been expended by the lunatic's committee upon his maintenance and the support of his establishment, and to charge them with so much of the allowance for that purpose as he shall find not to have been expended by them.

English committees not usually accountable for unexpended allowance,

allowance; yet no accounting was ordered, the Chancellor holding

unless great fraud is made to appear.

cue¹ it was alleged that the order of allowance had been obtained by a collusive agreement between the committee and the husband of the heiress-at-law for the division among themselves of the unexpended allowance; yet no accounting was ordered, the Chancellor holding that to compel an accounting under the circumstances, “unless some great fraud were made to appear,” would be extremely hard. The practice of allowing the savings out of the allowance for the lunatic’s support to be retained by the committee² is largely due to the fact, that under the English law committees of insane persons are entitled to no compensation for their services. Thus Lord Hardwicke refused a petition for an allowance for the trouble in taking care of the lunatic’s estates, which, it was alleged, were large and lay dispersed in England and Ireland; but suggested to the committee to prefer a petition to have an increased allowance for maintenance, in which petition he was not to take any notice of the master’s report, and on this petition he would order an additional allowance of £200 per year.³ In cases of clear misapplication of funds, however, account may be ordered.⁴

In America the liability of guardians, committees, and other trustees of lunatics to account is generally regulated by statute.

Accounting required in America.

The first duty in complying with this requirement must be, under the statutes of most States, the filing, in the court having jurisdiction, of a complete and

¹ The Attorney-General, and other counsel for the appellants, placed their chief objection to the Chancellor’s order on the broad ground, that the committee of the person of the lunatic is an office distinct from that of the committee of his estate, though they may be both granted to the same person, and that while the committee of the estate is bound to account for all that he receives, the committee of the person receives a stated allowance for the maintenance of the lunatic and his family, for which the terms of the order of his appointment do not oblige him to account, and in respect of which there is no instance of any order of the court to compel him to do so. The order of the Lord Chancellor was reversed in Privy Council.

¹ 3 P. Wms. 104, 109.

² As held in the Matter of Posonby, 5 Ir. Eq. 268, 272.

³ Matter of Annesly, Amb. 78.

⁴ Where, for instance, a lunatic had an allowance of £640 a year, and was deprived of the common necessities of life: *In re Rosoman*, decided in 1822 by Lord Eldon, as mentioned in the Matter of French, L. R. 3 Ch. App. 317, 319. And see Matter of Lanesborough, Lloyd & Gould, 503, 514, where an order appointing an applicant committee was reversed on the ground, that the appointment was coupled with an increase of allowance for the support of the lunatic, as an indirect mode of allowing compensation to the committee.

true inventory of the property, real and personal, of the ward. These inventories are required, in some of the States, to be filed within forty days of the appointment of the guardian,¹ in others within sixty days,² and in still others in three months,³ while in some States they must be filed in like manner as is required of executors and administrators.⁴ Where the committee fails to file an inventory of his ward's estate, or to render the periodical accounts required either by statute or the rule of court, he is guilty of gross neglect, and everything in relation to the estate will be taken most strictly against him; while, if he file an inventory and render account regularly, every presumption in reference to the fairness and justness of the accounts would operate most strongly in his favor.⁵ Failure to make the periodical statements as required by law is held a ground for the removal of the guardian.⁶

Inventory must be filed.

Omission to file inventory or periodical account is gross neglect

and ground for removal.

Since it is the duty of a conservator to make a perfect inventory of the ward's estate, and he is liable for any neglect of duty in taking care of and managing this estate, it follows that he is armed with all the power necessary for this purpose. Hence, conservators or guardians of insane persons have the right to enter the dwelling-houses of their wards, without permission of the latter, and against their will, to take an inventory of their property, or to attend to any other duty requiring such entry.⁷ But the authority and duty of the guardian extends to such property of his ward only as will constitute an asset of his estate, or evidence of his title to property. Hence, the guardian has no right to the custody of the last will of his ward, executed while sane, and delivered to another person with instructions to keep the same until the testatrix's death, unless she called for it, and on her death to deliver it to her executor.⁸

Right to enter dwelling without ward's consent to take inventory;

but only as to property constituting assets.

The periodical accounting by committees and guardians is

¹ So in Pennsylvania, for instance: § 2937. See also Gen. St. Conn. 1888, Bright. Purd. Dig. 1883, p. 1128, § 24. § 478.

² As in Illinois: Rev. St. 1889, ch. 86, § 6; Missouri: Rev. St. 1889, § 5527.

⁵ Matter of Carter, 3 Paige, 146, 148.

³ As in Arkansas: Dig. 1894, § 3827; Kansas: Gen. St. 1889, §§ 3691 *et seq.*; Wyoming: Rev. St. 1887, §§ 2319, 2324.

⁶ Fincher v. Monteith, 5 Lea, 144; to similar effect: Lowe v. Lowe, 1 Tenn. Ch. 515.

⁷ State v. Hyde, 29 Conn. 564, 569.

⁴ As in Colorado: Mills' St. 1891,

⁸ Mastick v. Superior Court, 94 Cal. 347.

Time of periodical accounting. generally required to be made once a year,¹ or oftener, at the discretion of the court;² in Colorado at the end of six months after appointment, and at every alternate term of the court thereafter;³ in Delaware at least once in two years.⁴

Where the estate of the lunatic is not greater in amount than what is necessary to yield a sufficient income for his comfortable support, the trustee is sometimes relieved of the liability to account in small estates. liability to account for the profit thereof, and ordered to retain the same for his own use, on condition of giving bond to maintain the ward and furnish him with everything necessary for his comfortable subsistence, according to his estate and condition, and to file an inventory, and to deliver up the estate at any time when thereto ordered by the Chancellor.⁵ Under such an order, the trustee is bound to provide for the lunatic in a manner suitable to his situation in life, paying all incidental expenses, and looking to the clear profits for compensation; he is not entitled to credit for incidental expenses of the trust;⁶ nor is such order a bar to an action against the committee to account for profit subsequently made to himself by the labor of the ward.⁷

There is little, if any, difference between the periodical accounts, or settlements, as they are in some States designated, of guardians or curators of minors, and the periodical accounting or settlements of committees or guardians of insane persons.⁸ Like the former, the latter are, so long as the conservator is still engaged in the performance of his trust, at most only *prima facie* evidence of his proper conduct and management of the estate; until his final report, made on notice to the ward, if restored to reason, or with his personal representative after his death, or with a successor if the guardian has been removed, the annual or other periodical reports or settlements are open to review

¹ For instance, in Arkansas: Dig. 1894, § 3845; Connecticut: Gen. St. 1888, § 498; Illinois: Rev. St. 1889, ch. 86, § 8; Missouri: Rev. St. 1889, § 5541; Wyoming: Rev. St. 1887, §§ 2319, 2394.

² As in Kansas: Gen. St. 1889, § 3709; Missouri: Rev. St. 1889, § 5541.

³ Mills' St. 1891.

⁴ Rev. C. 1874, ch. xlix. § 2.

⁵ Boarman's Case, 2 Bland Ch. 89, 90, 92.

⁶ Moore v. White, 4 Harr. & J. 548, 550.

⁷ Ashley v. Holman, 15 S. C. 97, 104.

⁸ As to the effect of periodical or intermediate accounting, see *ante*, § 97.

and correction.¹ Hence, there is no appeal from a periodical settlement.² But such settlements, having received the sanction of a judicial tribunal, and remained unchallenged for a length of time, require that they should be regarded as *prima facie* evidence of their own correctness, subject only to be impeached by surcharge or falsification as in other cases of *ex parte* settlements made under the sanction of a court.³

No appeal
from periodical settlement.

In Ohio it is provided by statute, that no voucher signed by the ward shall be received in settlements by guardians; any settlement in which such receipt was introduced is to be deemed void, and may be opened on motion of a succeeding guardian within two years after the removal of the former guardian, or the removal of the ward's disability, or his death.⁴

Vouchers in
Ohio.

§ 152. **Final Accounting by Guardians of Insane Persons.** — Upon the cessation of the guardian's authority over his ward's estate, which may be by the *supersedeas* of the commission (on restoration of the ward), or by the resignation, removal, or death of the guardian, or by the death of the ward, there must be final accounting by the guardian or committee, or by his representatives, with the former ward, or his representatives, or the successor in the guardianship. It is no defence to such accounting when demanded by the lunatic's administrator, that a suit by the lunatic by next friend had been settled by an agreement reduced to writing and signed by the lunatic's next friend and by his committee, according to which the committee was to be discharged from further liability on account of the lunatic's estate, unless such agreement had been authorized by the court, although the committee had carried out said agreement on his part.⁵ The guardian or trustee of a lunatic is bound to account, in equity and at law, for all the estate, income, and effects of the ward which came into his possession, or under his care and direction; ⁶ and this whether his appointment was legal or not, in so far as he received such estate by virtue and under

Final settlement necessary on termination of guardianship.

Guardian is accountable for all estate that came to his hands,

¹ *State v. Jones*, 89 Mo. 470, 478; *Wilcox v. Parker*, 23 Ill. App. 429, 432; *Curatorship of Beecroft*, 28 La. An. 824.

² *Fuchs's Case*, 6 Wharton, 191.

³ *Hardin v. Smith*, 7 B. Mon. 390, 395.

⁴ Rev. St. 1890, § 6304.

⁵ *Clark v. Crout*, 34 S. C. 417, 437.

⁶ *Devilbiss v. Bennett*, 70 Md. 554, 560.

color of his appointment.¹ It has been decided, that guardians of lunatics are liable to the same rule of accountability as guardians of minors,² and that hence they are liable for interest in the same manner and to the same extent.³

It is obvious that the accounting by a committee or guardian of an insane person appointed by a court of chancery should be made before the court having appointed him, so long as such court possesses jurisdiction over both the lunatic and his committee.⁴ On the death of the lunatic the office of the committee is determined, and the only power chancery retains over him as such is to compel him to account and deliver possession of the property as the court shall direct.⁵ But when the jurisdiction peculiar to such court has ceased, by the death, for instance, of both ward and committee, and when the estate of the lunatic has passed, by grant of administration, absolutely to another jurisdiction, the administrator of the latter may sue for the estate of his intestate in the hands of the personal representative of the committee in any county in which he may be found.⁶

The guardian of a lunatic is the proper custodian of the ward's effects so long as his authority continues. If a next friend sue for waste, or to recover money in his hands, it can be done only in connection with a proceeding to remove the guardian; a judgment awarding a recovery for so much money, without removal or revocation, is not authorized by law.⁷

Where the jurisdiction over insane persons is vested in probate courts, it is in some States provided by statute that on the death of an insane ward his property shall be delivered to his executor or administrator, and that the conservator shall file his final account in the Probate Court, which is to pass upon and allow it if found correct;⁸ or that

¹ Pannill v. Calloway, 78 Va. 387, 394.

² As to accounting by guardians of minors, see *ante*, §§ 94-107.

³ Spack v. Long, 1 Ired. Eq. 426; Bird v. Bird, 21 Gratt. 712, 720.

⁴ So a chancery court refused to entertain a bill in equity brought against an insane person by his guardian for a settlement of the guardian's account, and for the payment to him of any balances due; the proper method of proceeding being held to be by petition filed by the guar-

dian: Talley v. Talley, 2 Dev. & B. Eq. 385, 388.

⁵ Matter of Colvin, 3 Md. Ch. 278, 288; Cain v. Warford, 3 Md. 454, 461; Matter of Beckwith, 87 N. Y. 503, 508; Dean's Appeal, 90 Pa. St. 106, 110; Cain v. Warford, 7 Md. 282, 287; Ordway v. Phelps, 45 Iowa, 279.

⁶ Hardin v. Smith, 7 B. Mon. 390, 398.

⁷ Bonner v. Evans, 89 Ga. 656.

⁸ So, for instance, in Connecticut: Gen. St. 1888, § 481.

in such case the guardianship ceases, and the deceased lunatic's estate is to be settled as the estate of a deceased sane person is settled;¹ or that settlement must be made by the guardian with the personal representatives.² In Missouri, where the statute requires the guardian of an insane person to render a just and true account of his guardianship once a year, and make settlement thereof with the court having appointed him, and on the death of the ward to immediately settle his accounts and deliver the estate and effects of his ward to his personal representatives, it is held that final settlement must be made in the Probate Court (the sole court having power to appoint such guardians), and that appeal lies from the decree on such settlement to the Circuit Court, where the cause is tried *de novo*.³ So, also, guardians are required, on their removal from office, to account to their successors;⁴ and may be discharged by the Probate Court whenever it appears that they are no longer necessary for the protection of the ward, and ordered to restore all his personal and real property in their hands.⁵ In Georgia the guardians of deceased lunatics are vested with all the powers of administrators, and are controlled by the laws there in force in relation to administrators.⁶

Jurisdiction in Missouri exclusively in Probate Court.

In Georgia guardians become administrators on ward's death.

The jurisdiction of the Probate Court to settle and allow the account of a conservator in the administration of the estate of his ward after revocation of his appointment is deduced from a statute directing bond payable to such judge to be given by the conservator; an inventory of the ward's estate to be filed in the Probate Court; account to be rendered to said court when required; on application of the conservator, such court to order the sale of real estate and empower the conservator or some other person to sell and convey the same, giving

In Connecticut and Alabama.

¹ For instance, in Kansas: Gen. St. 1889, § 3715; New York: Bliss' Ann. Code, 1890, § 2344, and see *Carter v. Beckwith*, 128 N. Y. 312, 320; Wisconsin: Ann. St. 1889, § 3988.

² In Wyoming: 1887, § 2325.

³ *Coleman v. Farrar*, 112 Mo. 54, 64, three of the eight justices dissenting and holding, that when the account has been stated by the Probate Court and made a matter of record, that court has exhausted all its power, and can render no judgment

thereon, nor will an appeal lie: pp. 77 *et seq.*

⁴ In Arkansas: Dig. 1894, § 3856; Kansas: Gen. St. 1889, § 3717; Wyoming: Rev. St. 1887, § 2327. In such case, if the successor is also removed, another conservator appointed subsequently may bring the action for the estate in the hands of the original conservator: *Richardson v. People*, 85 Ill. 495, 496.

⁵ So provided by Ann. Statute of Wisconsin, 1888, § 3987.

⁶ *Jefferson v. Bowers*, 33 Ga. 452.

bond to dispose of the proceeds under direction of said court, after a reasonable allowance to the conservator for his services, to be ascertained and allowed by the Court of Probate, etc.¹ In New

Jersey the Orphans' Court is said to be simply a court of account; hence, the decree of that court on the final settlement by a guardian of a lunatic who had been restored to his right mind creates no legal liability, but only ascertains the extent or measure of a previously existing liability; but in an

action against the guardian for money had and received such decree is conclusive evidence of the amount in his hands.² It is similarly held in Indiana,³ Illinois,⁴ and Pennsylvania.⁵

Where a guardian becomes *non compos mentis* without having settled his accounts, the Probate Court, on principle and the analogies of the law, has jurisdiction to call the *non compos* guardian to account and to proceed to a final decree; and having such jurisdiction, it may entertain the same over an account filed by such guardian, by his guardian or committee.⁶

§ 153. Principles applied in Accounting by Guardians of Insane Persons. — In allowing and settling the periodical and final accounting by committees or guardians of insane persons, equitable principles are usually applied, since they are *quasi* trustees.⁷ While on the one hand

¹ Nettleton's Appeal, 28 Conn. 269, 272, holding that the statement of the chief justice in Spalding v. Butts, 5 Conn. 427, to the contrary was not the decision of the court, which latter was not in conflict with the principle announced in Nettleton's Appeal. See dissenting opinion of Judge Bristol in Spalding v. Butts, p. 430. But the principle of Nettleton's Appeal certainly militates against the doctrine of Norton v. Strong, 1 Conn. 65, on the authority of which Spalding v. Butts was decided, and which holds that the jurisdiction of the County Court in relation to the ward's estate ceases together with the rights and duties of the conservator on the death of the ward. The doctrine announced in the text is also held in Alabama: Modawell v. Holmes, 40 Ala. 391, 401.

² Shepherd v. Newkirk, 21 N. J. L. 302,

307; s. c. 20 N. J. L. 343, holding that an action does not lie on the decree, but that the proper remedy is by action for money had and received.

³ Stumph v. Pfeiffer, 58 Ind. 472, 476. The court has no power to enforce an order directing the guardian to pay the amount found to be due; the remedy is held to be an action against the guardian personally, or an action on his bond as guardian.

⁴ Richardson v. People, 85 Ill. 495.

⁵ In this State, the balance due a committee of a habitual drunkard regularly filed and confirmed in the Court of Common Pleas becomes a debt of record, collectible by action and available as a set-off: Vincent v. Watson, 40 Pa. St. 306, 308.

⁶ Modawell v. Holmes, 40 Ala. 391, 403.

⁷ Pom. Eq. Jur. §§ 157, 1088, 1097.

they will not be allowed to make any profit to themselves out of their relation to their wards,¹ they will not, on the other hand, be liable for any loss to the lunatic's estate unless they have been guilty of negligence, malversation, or fraud.² Thus the committee is chargeable with the profit of his ward's labor,³ unless such labor is enforced only for the proper discipline and healthful employment of the ward, in which case the committee is not so liable.⁴ The committee is liable for the consequences of his negligence; if he has leased his ward's lands and slaves without security, to a party who was not known or proved to be in good credit at the time of making the contract, he is chargeable for the loss of rents and profits sustained.⁵ So the guardian of a spendthrift is responsible for all losses arising out of his disregard of the terms of his license to sell the real estate of his ward, both as to the manner of making the sale, and the disposition of the proceeds; and the ward's assent to the proceedings does not exonerate him from his liability.⁶ The guardian must be held to a strict and just account as to the property of his ward; and if, by his negligence, or failure to observe the requirements of the statute in caring for and making sale of the same, the estate of the lunatic sustain damages, he will be required to account therefor in all proper ways and connections. When, however, he in good faith pays debts that ought to be paid, and the estate suffers no prejudice by so doing, he should receive credit for the disbursement in such respect.⁷ The rule in respect of the custody of the ward's money is the same as that applied to fiduciaries in general;⁸ a *bona fide* deposit of the ward's money by the guardian or committee in his own name, in a bank in which he has no funds of his own, will make him responsible only for due diligence in the selection of

Guardians
not allowed
to profit,

nor liable to
loss, except for
negligence
or fraud.

Chargeable for
ward's labor,
unless it be
for ward's
discipline.

Liable for
negligence,

or disregard
of terms of
license in sell-
ing real estate.

But should
receive credit
for disburse-
ments honestly
made.

And liable for
loss of money
deposited only
if done so with
negligence.

¹ But are, in America, generally compensated for their services, as to which see *post*, § 154.

² *Matter of Hathaway*, 80 Hun, 186, 189. Their rights and liabilities are as near as may be like those of guardians of infants, as to which see *ante*, §§ 94 *et seq.*, 103 *et seq.*

³ *Ashley v. Holman*, 15 S. C. 97, 105.

⁴ *Ashley v. Holman*, 25 S. C. 394, 400.

⁵ And the burden of proof is on such committee: *De Treville v. Ellis, Bailey* Eq. 35.

⁶ *Harding v. Larned*, 4 Allen, 426.

⁷ *McLean v. Breese*, 109 N. C. 564, 566.

⁸ See *ante*, § 63 *et seq.*

the depository and due vigilance in respect of the depository's continued solvency.¹

Committees are held liable, by statutory authority in some States, upon the principles governing the accounts of guardians.²

When any item in the account of a guardian is contested, evidence of the regularity and necessity of the expenditure should be required by the court, and the facts in regard thereto found; to make a voucher presumptive evidence, it should state the time when the expenditure was made, on what account, and such other facts as may indicate the propriety of the payment.³

Heirs-at-law of a deceased lunatic are admitted to except to the accounts of the committee, where the attorney in fact of the trustee, who had acted for him and passed the accounts, is the administrator; and in such case previous accounts of the trustee, although they have been long passed by the Chancellor, are open for re-examination.⁴

Stationery, it has been held, should be paid for by the committee, and not charged to the lunatic's estate.⁵

The guardian of a lunatic cannot be allowed in his probate account the amount of damages occasioned to his own property by his ward's want of care. The decision is not based on any determination of the question whether an insane person is liable for a *tort*,⁶ but on the want of jurisdiction of the Probate Court to try claims for torts in probate accounts; these are not matters arising out of the trust, and must be tried in a court of common law, at its bar and under its rules. Nor could such a question be settled even in a common law court, during the continuance of the relationship of guardian and ward. But the trust being terminated, and the claim surviving, the guardian's only course is to sue the administrator in a court of law, and, having its judgment fixing the damages, to collect it from the assets, if the estate is solvent; if not, to share with the other creditors.⁷

¹ Parsley v. Martin, 77 Va. 376, 380; Gregory v. Parker, 87 Va. 451, 457.

² Bird v. Bird, 21 Gratt. 712, 720.

³ McLean v. Breese, 109 N. C. 564.

⁴ Vinson v. Vinson, 1 Del. Ch. 120.

⁵ Colvin's Estate, 4 Md. Ch. 126, 127.

⁶ "It is a common principle, that a

lunatic is liable for any *tort* which he may commit, though he is not punishable criminally;" Morse v. Crawford, 17 Vt. 499, 502. See, on the liability of insane persons for their torts, *ante*, § 141.

⁷ Brown v. Howe, 9 Gray, 84.

As heretofore observed, guardians of insane persons have no authority to exceed the income of their wards, without express authority of the court, in the disbursements for and on account of the lunatic.¹ But where it appears that the committee of a lunatic, although he may not have been as economical of his expenditures in the care of a lunatic as he might have been, if it is clear that he was upright in the discharge of his trust, and that whatever unnecessary expenditures he made were in the interest of the personal comfort of the lunatic, he will not be surcharged for such expenditures, even if he did not previously apply to the court for leave to make them, if the court subsequently ratifies his acts.²

Income of ward not to be exceeded in disbursements, unless subsequently sanctioned by court.

A committee cannot trench upon the *corpus* of his lunatic's estate for the bringing of a suit, unless he first obtain leave of court; and unless he shows that there was great necessity for bringing the suit, or advantage to accrue to his beneficiary, he will not be allowed credit out of the estate for such expenses, but they must be made good by the committee.³

Corpus of the estate should not be trenched on to pay costs of suit, without leave of court.

A committee or guardian who, in a settlement out of court, allows illegal credits in the account of his predecessor, is liable to the ward for the amount so allowed.⁴ So a person who has assumed the duties of a committee of the person and estate of a lunatic, charges himself in his inventory with the amount found to be in the hands of his predecessor, payable in cash, at the settlement made by such predecessor, is chargeable with such amount as if he had received it in cash, although he had accepted several mortgages in lieu of cash; and if such mortgages were not proper securities for investment of trust funds, the responsibility of the committee will be the same as if he had himself invested the funds of his ward.⁵

Guardian settling with a predecessor is liable to the ward for illegal credits allowed,

and the amount due the ward in cash, although he accepted mortgages in lieu of cash.

The conservator has no lien upon his ward's estate for disbursements made in his lifetime for his support, so as to entitle

¹ *Ante*, § 147.

² *Estate of Hain*, 167 Pa. St. 55, 61.

³ *Ashley v. Holman*, 21 S. E. (S. C.) 188, 624, 632.

⁴ *Ashley v. Holman*, *supra*.

⁵ *Matter of Hathaway*, 80 Hun, 186,

Conservator has no lien for his disbursements.

him, on the ward's death, to retain possession against his executor.¹

Ward not estopped by approval of sale from demanding an accounting;

The approval by the Probate Court of the final report of the guardian of an insane person, who had procured a deed to her ward's lands, prior to the adjudication of his insanity, but while he was in fact insane, and was subsequently appointed his guardian, is not such an adjudication as precludes him from demanding, in an action to set aside the conveyance, an accounting for the rents and profits of the land.² But where a guardian has fully ac-

but final settlement will not be opened to allow the presentation of a claim against the ward.

counted for the property in his hands, and turned over the same to the ward after his release from guardianship, and the court has entered an order discharging the guardian, the guardianship cannot be revived to enable a claim previously filed to be presented against the ward's estate, or to be secured by the guardian's bond. And the claimant has no such interest in the estate as will entitle him to appeal from the order discharging the guardian.³

Ward may demand accounting of partnership estate administered by his guardian.

The proceeding upon the rendition of a conservator's final account is one *in rem*; but this principle does not militate against the right of the lunatic to demand accounting concerning his partnership interest, after recovery, by his partner, who, as his conservator, had neither inventoried nor brought into the account this partnership interest.⁴

§ 154. Compensation of Guardians of Insane Persons. — Under the English law, committees of insane persons were, as a general

Committees and guardians not allowed compensation in England;

rule, allowed no compensation whatever for their care and trouble.⁵ This practice, as pointed out by Chief Justice Daly,⁶ produced its natural effect. Cases occurred in which no one was found willing to incur the onerous duty and responsibility, giving security for its faithful discharge, without compensation or indemnity. To obviate this

but receivers are,

difficulty, Lord Eldon directed, in such a case, that a receiver should be appointed with a salary, saying

¹ Norton v. Strong, 1 Conn. 65, 70.

⁵ Anonymous, 10 Ves. 103; Matter of

² Warfield v. Warfield, 76 Iowa, 633, 638. Annesly, Amb. 78.

³ Lyster's Appeal, 54 Mich. 325.

⁶ In the Matter of Colah, 6 Daly, 51,

⁴ Raymond v. Vaughan, 17 Ill. App. 60.

144, 150.

that if he gave such security, satisfactory to the attorney-general, as a committee gives, it was immaterial whether he is called committee or receiver.¹ Another practice, more difficult to reconcile with that vigilant and jealous scrutiny usually exercised by courts of equity over fiduciaries, grew out of the rigorous rule denying compensation to committees of insane persons, in allowing the committee to retain the whole amount of whatever allowance the court made for the maintenance of the ward without accounting therefor, on the theory that the committee is entitled to the savings out of such allowance, and that they form no part of the lunatic's estate.² The rule was subsequently modified, and may now be stated to be: "Under special circumstances remuneration may be given to a committee; but the general rule is, that a committee, like any other trustee, is not entitled to remuneration, but to reimbursement alone."³

and allowance for maintenance of ward increased to remunerate the committee.

In New York, the question arose before Chancellor Kent, who held that the subject came within the equity of the statute which allowed to guardians of minors, executors, and administrators a reasonable compensation for their services, and adopted a rate which he thought not so high as to inflame the cupidity of such trustees, though higher than the allowances to the masters and registers in chancery.⁴ This rule was adhered to in later cases as applicable to committees of insane persons.⁵ But in the celebrated *Parsee Merchant's Case*,⁶ it was held that where there is a separate committee of the person of the lunatic, the rule adopting the analogy of the statute fixing the compensation of executors and administrators is not applicable, and that the

Compensation allowed on the equity of the statute allowing compensation to executors.

¹ *Ex parte Warren*, 10 Ves. 622; *Matter of Radcliffe*, Jac. & W. 619; *Ex parte Billingham*, Amb. 104.

² See *ante*, §151, and particularly note 7, p. 505, notes 1, 2, p. 506.

³ *Adams*, Equity, p. 293; *Shelf. Lun.* 162.

⁴ The rate allowed, and made a general rule as to guardians, executors, and administrators, subsequently enacted by statute, was a commission of 5 per cent. on all sums received and paid out, not exceeding \$1000 (*i. e.*, 2½ per cent. for such sums received, and 2½ per cent. for

such sums paid out); 2½ per cent. on any excess between \$1000 and \$5000; and 1 per cent. on all sums above \$5000: *Matter of Roberts*, 3 Johns. Ch. 42.

⁵ *Matter of Livingston*, 9 Paige, 440, 442.

⁶ 11 Abb. N. S. 209; also reported under the style of *Bomanjee Byramjee Colah* in 3 Daly, 529; and on a later proceeding, in the same case, reported in 6 Daly, 51; in which latter case the whole question of compensation to committees of lunatics is thoroughly argued and numerous cases are reviewed.

compensation is to be adjusted by the court.¹ In a later case,² it was held that a committee of a lunatic is, on final accounting after the lunatic's death, though occurring two months after the committee's appointment, entitled to full commission for receiving and paying out the property which came into his hands as such committee, without regard to previous disbursements. It is also held that a committee who through negligence and inattention fails to realize any interest on the yearly balances due the lunatic, is not entitled to commissions.³

Full commissions allowed, though ward died two months after guardian's appointment.

The theory upon which the later New York cases allow compensation is, that the committee, like a receiver, is an officer of the court, and, in the absence of legislation on the subject, his compensation is within the discretion of the court, not restricted to the allowance of such sums as would be allowable to an executor or administrator under the statute.⁴

Theory of allowance in New York,

In South Carolina, however, the law is held to be, that a committee appointed by the Circuit Court to manage the estate of a lunatic is a trustee, and that, since the statute expressly allows to executors, administrators, guardians, and trustees, for their care, trouble, and attendance in the execution of their trusts, $2\frac{1}{2}$ per cent. for receiving, and $2\frac{1}{2}$ per cent. for paying away all moneys passing through their hands; and for extraordinary trouble they may bring an action in the Court of Common Pleas to recover additional compensation not exceeding 5 per cent. in addition to the sum so allowed, the committee is entitled to compensation at the same rate.⁵ So, in a case in

South Carolina,

Massachusetts, where a commission of 5 per cent. on the gross amounts collected was not objected to by the contestants of the accounting committee, a salary of one hundred dollars per month for the services of the guardian in the personal charge of the ward was allowed in addition to the commission, as reasonable under the circumstances of the case; but commissions on the amounts expended and on re-investments

¹ In this case, the health of the lunatic required his removal to Bombay, his home, and the attendance of his committee on the voyage; for which, as well as for all other services rendered, the committee was allowed \$5000.

² *Blossom's Estate*, 7 N. Y. Supp. 360 (1889).

³ *Matter of Gallagher*, 17 N. Y. Supp. 440.

⁴ *Matter of Colah*, 6 Daly, 51, 57 & seq.

⁵ *Ex parte Lyde*, Rich. Cas. in Ch. 3.

were held objectionable; and charges for the attendance of the committee in court, and for personal attendance on the ward in journeys were disallowed.¹

The question of compensation to committees or guardians of insane persons is mostly regulated by statutes in the several States, and is in many of them left to the discretion of the probate judges having jurisdiction over them.²

Compensation in discretion of courts.

Under such a statute, conservators who neglect to make the annual reports and settlements required by law, and fail to keep account of their acts, are in no condition to ask for an allowance for their services.³

No compensation to delinquent conservators.

Twenty-five dollars per year was held a reasonable compensation under ordinary circumstances.⁴

Where compensation was allowed a committee in the shape of commissions, such commissions were refused on the *corpus* of an undue registered United States bond, and allowed only on the collections of interest thereon.⁵ For the collection of rent from prompt paying tenants in possession when the committee took charge of the estate, 5 per cent. was held full compensation.⁶

Commission not allowed on bonds.

Since it is both the right and the duty of a wife to protect and care for her insane husband in such manner as to best secure his safety and comfort, she is not entitled to compensation on being appointed special custodian to this end.⁷

Wife as custodian of her husband not entitled to compensation.

§ 155. *Costs in Lunacy Proceedings.* — In England the rule was, before the statute known as the Lunacy Regulation Act,⁸ to allow the costs in lunacy proceedings out of the estate of the lunatic, if the lunacy was established, but if not, or if on traverse the party was found not to be a lunatic at the time of the commission issuing, or if

Costs in England before Lunacy Regulation Act,

¹ *May v. May*, 109 Mass. 252, 257.

² For instance in Illinois, where the conservator is to "be allowed such fees and compensation as shall seem reasonable and just to the court:" *Matter of Hall*, 19 Ill. App. 295, 297.

³ *Matter of Hall*, *supra*.

⁴ *Matter of Hall*, *supra*.

⁵ *Gregory v. Parker*, 87 Va. 451, 453.

⁶ *Gregory v. Parker*, *supra*.

⁷ *Grant v. Green*, 41 Iowa, 88: The majority of the court held, that a contract

between the guardian of an insane husband and the wife, that the latter should care for the husband and receive a certain sum for her services, is without consideration and void; Cole, J., dissented on the ground, *first*, that under the statute of Iowa the wife has a right to her personal earnings; and, *next*, that the guardian was authorized to employ some person as custodian of his insane ward and a fair and reasonable contract with the wife is valid.

⁸ 25 & 26 Vict. c. 86, § 11.

there was a *supersedeas* before any of the property vested in the crown, no costs could be allowed to the party taking out the commission, no matter how meritorious his intention; because there was no fund in the hands of the Chancellor out of which the costs could be taken, and there was supposed to be no power to compel the payment by the ordinary process of chancery.¹ Under

the act above mentioned, the Lord Chancellor is now authorized to order all costs, charges, and expenses of and incidental to any proceedings in lunacy to be paid either by the party presenting the petition, or out of the estate of the lunatic, or partly by the one and partly by the other, as the Lord Chancellor in each case shall deem proper.

In the United States, in the absence of statutory regulation of the subject, costs are as a general rule decreed accord-

ing to equitable principles, at least so far as proceedings are in chancery courts. It is not a matter of course to charge a petitioner with costs when he fails to establish the lunacy charged; but

the matter rests in the sound discretion of the court having jurisdiction. If, in such case, he acted in good faith and upon probable cause, he will not be charged with costs;² although the prosecutor can be allowed no costs, there being no fund out of which they could be ordered to be paid, yet he will not be condemned to pay the respondent's costs; it is held sufficient to restrain the prosecution of an unfounded charge of lunacy, that the prosecutor must bear his own costs if he fails to establish the lunacy. And the fact that a jury, legally and properly empanelled, has found the party proceeded against to be mentally incompetent to manage his property, is sufficient to show, *prima facie*, probable cause, although another jury, on the trial of the issue, have found the other way.³ And so, though the proceedings in lunacy be deemed special, so as to be within the purview of a statute authorizing the allowance of costs according to the discretion of the court, yet the court cannot grant extra allowances to the party found sane, such as counsel fees and fees of expert witnesses.⁴

¹ Clark's Case, 22 Pa. St. 466, 468, citing English authorities; Matter of Farrell, 51 N. J. Eq. 353, 359 *et seq.*

² Matter of McAdams, 19 Hun, 292; Clark's Case, 22 Pa. St. 466, 470; Matter of Weaver, 116 Pa. St. 225, 231; Carter v.

Beckwith, 128 N. Y. 312, 317; Brower v. Fisher, 4 Johns. Ch. 441.

³ Matter of Giles, 11 Paige, 638; Matter of White, 17 N. J. Eq. 274, 277.

⁴ Matter of McAdams, 19 Hun, 292.

The question of costs in lunacy proceedings, in equity courts as well as in probate or other courts vested with jurisdiction, is now regulated by statute in most of the States. It is held, in proceedings before probate courts, that the general rule of law requiring the plaintiff who institutes a suit to pay costs if he does not succeed, is applicable to proceedings to declare a person of unsound mind, unless changed by statute;¹ hence, if the jury find such a person not of unsound mind, the court must render judgment against the person making the complaint.² In some States provision is made for the payment of costs by the county, if the lunacy is established, and the lunatic has no estate; and if the lunacy is not established, costs are to be paid by the person filing the information, unless he be a public officer.³ In such case the costs are purely matters of statutory regulation, and the courts have no power to adjudge them as against any one on merely equitable grounds.⁴ And so provisions exist directing the court, when a guardian has been appointed, to allow all reasonable expenses incurred in the defence of the ward against the petition to declare him an insane or incompetent person, or a spendthrift, to be paid by the guardian out of the ward's estate, in addition to the reasonable expenses of the guardian in defending his appointment.⁵ In such case it is error to adjudge costs against the appellant and his sureties on appeal from the County Court, if its judgment is affirmed in the Circuit Court, but the County Court should adjust the reasonable expenses of both, to be paid out of the estate.⁶

Costs mostly
regulated by
statute.

In Pennsylvania the old English rule was observed until by an amendment of the statute in 1849 a power similar to that conferred upon the English Chancellor by the Lunacy Regulation Act was vested in the courts of the commonwealth, authorizing costs to be decreed to either party, or to be apportioned among all the parties interested.⁷

English rule
under Lunacy
Regulation
Act adopted in
Pennsylvania.

¹ *Cochran v. Amsden*, 104 Ind. 282, 286, applying the principle to the case of an unsuccessful attempt to have the guardianship set aside.

² *Galbreath v. Black*, 89 Ind. 300, 302.

³ Dig. of Arkansas, 1894, §§ 3818, 3819. Similarly in Missouri: Rev. St.

1889, §§ 5518, 5519; Wyoming: Rev. St. 1887, §§ 2292, 2293.

⁴ *Union County v. Axley*, 53 Ill. App. 670, 672.

⁵ Rev. St. Wisconsin, §§ 3981*d*, 3981*e*.

⁶ *Barbo v. Rider*, 67 Wis. 598, 607.

⁷ *Clark's Case*, 22 Pa. St. 466, 470.

So in New Jersey, the English rule is held not to be altered by the Act of March 23d, 1837.¹

In New York the question of costs in lunacy proceedings has been fully discussed in numerous cases. It is there held that before inquisition found the petitioners are regarded as prosecutors; if they are unsuccessful, are liable to costs, and can in no event recover costs; and if the proceedings are instituted in bad faith, they will be charged with the costs.² Under a rule of the Supreme Court, committees are authorized to pay, without the order of court, the costs of the attorney who conducts the proceedings on the inquisition, a sum which, together with the other costs of the application and subsequent proceedings, including the appointment of the committee, will not exceed \$50;³ and the committee are entitled to the legal expenses incurred in the proceedings of the inquisition and in opposing the traverse, including the bills of the attorneys of the committee and a reasonable counsel fee on the trial of the traverse, and all disbursements, payable out of the funds in his hands.⁴

In Rhode Island it was decided (by two judges, the third, Haile, dissenting) that no costs are decreed in lunacy proceedings in the Probate Court; but that, since the informant may appeal from a decree, and must then give bond to pay costs, he thereby becomes a party to the proceedings, and is not therefore, a disinterested party, so as to be competent to make the affidavit of service.⁵

Guardians acting fairly are not liable for costs. Guardians of lunatics having a just pretence for suing, and conducting themselves fairly, are not chargeable with costs, even though they be unsuccessful in the suit.⁶

§ 156. **Counsel Fees.** — The cost of the commission is held to include the fee or fees paid to counsel, which are to be allowed the committee in his accounting, unless excluded by a previous order of the court.⁷ So it is proper to allow the committee the legal services paid for by him, the committee in his accounting, unless excluded by a previous order of the court.⁷ So it is proper to allow the committee the legal services paid for by him,

¹ Matter of Farrell, 51 N. J. Eq. 353, 359 *et seq.*

² Matter of Arnout, 1 Paige, 497, 501; Matter of Clapp, 20 How. Pr. 385, 387.

³ Matter of Clapp, *supra*.

⁴ Matter of Clapp, *supra*. See also, Matter of Beckwith, 3 Hun, 443, 448, and cases there cited; s. c. 87 N. Y. 503.

⁵ Baker v. Searle, 2 R. I. 115.

⁶ Alexander v. Alexander, 5 Ala. 517, 519; Sanford v. Phillips, 68 Me. 431.

⁷ Matter of Colvin, 4 Md. Ch. 126, 128. The amount allowed in this case was \$1200, the estate being large, and great caution being demanded.

rendered in the discharge of his duties as such, in defending and protecting the estate.¹ The rule, that trustees incurring expenses in managing trust property are entitled to reimbursement out of the trust fund, and that reasonable attorney's and counsel fees, connected with the management of the trust business, will be allowed as a part of the expenses,² is fully applicable to committees and guardians of insane persons.³ So the reasonable expenses of a guardian in consulting an attorney at law as to his duty in regard to the presentation of a petition of his ward for the revocation of guardianship, and in resisting the application when there is reasonable doubt of his restoration, are to be allowed.⁴ And the guardian may be required to pay an attorney employed to prosecute the proceeding to declare a person insane;⁵ but no contract entered into before the determination of the inquest can bind the estate of the ward beyond the reasonable value of the services rendered in conducting the proceedings.⁶ And upon the dismissal of such proceedings the court may award costs against the person who instituted the inquiry.⁷

Counsel fees paid by guardian allowed,

including fees for advice, resisting motion to revoke guardianship.

Fees for prosecuting proceedings to declare party insane.

But fees paid to counsel for conducting a controversy in which the estate of the lunatic is not interested, as, for instance, at what time the lunacy commenced, if that fact be indifferent to the issue tried; or what particular person is to be appointed committee; or concerning the appointment, after the lunatic's death, of an administrator; or the appointment of a receiver, or for the removal of the committee, — cannot be charged upon the estate, but must be borne by the parties interested in such controversies.⁸ Where costs are prescribed by statute and made taxable, the court is not authorized to allow to the solicitor of a petitioner for the appointment of a committee to a lunatic or habitual drunkard anything beyond the taxable costs

No counsel fees paid for conducting collateral controversy.

Where statute prescribes taxable costs, none but taxable costs can be allowed.

¹ Matter of Colvin, *supra*; Bulows v. O'Neill, 4 Desaus. 394, 398; Wier v. Meyers, 34 Pa. St. 377, 380.

² Downing v. Marshall, 37 N. Y. 380, 388, and authorities; Wetmore v. Parker, 52 N. Y. 450, 466.

³ Blossom's Estate, 7 N. Y. Supp. 360.

⁴ Palmer v. Palmer, 38 N. H. 418, 420;

and see Hallett v. Oakes, 1 Cush. 296, and cases *ante*, in relation to the liability of lunatics for necessities.

⁵ Brownlee v. Switzer, 49 Ind. 221.

⁶ State v. Nave, 69 Ind. 108.

⁷ Ruhlman v. Ruhlman, 110 Ind. 314.

⁸ Matter of Colvin, *supra*.

and disbursements; to entitle the solicitor to an order directing the committee to pay him for his taxable costs a sum beyond the amount allowed under the rule of court, there must be an affidavit stating the special circumstances which render an increased allowance necessary.¹ So the solicitor of one against whom a commission of lunacy is issued, who appears to oppose the same, has no legal claim against the estate of the lunatic, if the jury find the existence of lunacy at the time of the alleged retainer;² but the court may, in its discretion, allow such solicitor his taxable costs for opposing the commission, if the fact of lunacy was so much a matter of doubt that the Chancellor, if he had been applied to, would have directed such opposition upon the execution of the commission.³ So it is held in Louisiana, that the costs taxable against an unsuccessful petitioner to have one declared a lunatic do not include the fees of the attorney employed by the

In Louisiana. party sought to be interdicted; but charged the amount thereof, in a case where the husband sought to interdict his wife, who was successfully defended by a counsel of her own selection, on the community property; on the theory, that though ordinarily no debt can be created against the community without the husband's consent, yet in an interdiction suit by the husband the services of counsel for the wife are rendered necessary by the husband's action, and should be paid for by the community, unless, indeed, it were charged and proved that the husband had acted from motives of self-interest or passion.⁴

In Pennsylvania, an action at law does not lie against the committee of a lunatic to recover compensation for professional services rendered by the plaintiff, as an attorney, in conducting the proceedings in lunacy; the court that has the final settlement of the committee's accounts, has the exclusive control of such expenditures; but the estate, in the hands of the committee, is liable for such services.⁵ In a New York case the reverse was held by a surrogate.⁶

¹ Matter of Root, 8 Paige, 625, 627.

² Matter of Conklin, 8 Paige, 450.

³ Matter of Conklin, *supra*.

⁴ Breanx v. Francke, 30 La. An. 336. In this case the counsel charged for their services \$2500, from the allowance of which amount by the trial court the

defendant appealed. The Supreme Court cut down the allowance to \$1500 and the costs of printing the brief; but on rehearing the whole amount — \$2539.50 — was allowed.

⁵ Wier v. Myers, 34 Pa. St. 377.

⁶ Kowing v. Moran, 5 Dem. 56.

§ 157. **Appeals in Lunacy Proceedings** — In England appeal lies from any order of the Lord Chancellor in lunacy matters to the king in council.¹ In the United States it has been held that in the absence of statutory regulation there is no appeal from an order appointing or refusing to appoint a guardian or committee to a person found to be insane.² In Pennsylvania, the question, whether the refusal of the Common Pleas Court to remove a guardian is reviewable on appeal by the Supreme Court, was expressly left undecided;³ and writs of error do not lie on the finding of a person to be insane, returned into the Common Pleas Court,⁴ nor from the decree of this court on the accounting by a lunatic's committee.⁵

No appeal in absence of a statute.

In Pennsylvania *quære*,

The right to appeal from the decrees and judgments of courts having jurisdiction in lunacy is very generally regulated by statute.⁶ In cases arising in courts of probate, or of other limited jurisdiction, a trial *de novo* in the appellate court is often provided for on appeal from any final judgment or order touching proceedings in lunacy, which involves the right to a further appeal from such court or writ of error to the court of last resort.⁷ In such cases, the primary appellate courts stand in the shoes of the court from which the appeal was originally taken, possessing the same, but no other, jurisdiction.⁸

But is generally given by statute.

With trial *de novo* in appellate court.

But where neither appeal nor a writ of error lies, the proceedings in a lunacy case may be removed to a revisory court by *certiorari*.⁹ Thus, it was held in Pennsylvania, that no writ of error lies to review the judgment of the Court of Common Pleas quashing an inquisition in a case of lunacy; the process by which the proceedings are to be removed is a *certiorari*. But a judgment rendered by said court

Certiorari lies where appeal or writ of error is not given.

¹ Shelf. Lun. 19, and authorities.

² Matter of Griffin, 5 Abb. N. S. 96; Black's Case, 18 Pa. St. 434; Willis v. Lewis, 5 Ired. L. 14; Ray v. Ray, 11 Ired. L. 357.

³ Dean's Appeal, 90 Pa. St. 106, 110.

⁴ Gest's Case, 9 Serg. & R. 317.

⁵ Fuchs's Case, 6 Whart, 191.

⁶ For instance in Georgia: Code, 1882, § 1857; Illinois: Rev. St. 1889, ch. 86, § 40; Kentucky: St. 1894, § 2152; Ver-

mont: Shumway v. Shumway, 2 Vt. 339; Massachusetts: Chase v. Hathaway, 14 Mass. 222.

⁷ Snyder v. Snyder, 142 Ill. 60, 65.

⁸ Interdiction of Bothwick, 43 La. An. 547; Snyder v. Snyder, *supra*; Cleveland v. Hopkins, 2 Aik. 394, 400.

⁹ Commonwealth v. Beaumont, 4 Rawle, 366; Cooper v. Summers, 1 Sneed, 453, 456.

after pleading to an issue on a traverse of the inquisition is revisable on a writ of error.¹ The effect of a *certiorari*, where no provision exists for the appeal, and of an appeal, where no mode of trying the appeal is prescribed, is the same as that of an appeal in error, or of a writ of error proper; that is to say, the appellate court can only *revise* the proceedings of the court below, and affirm or reverse the same as the case may require.²

The person of unsound mind being presumed incapable of taking an appeal, it may be taken by any person aggrieved by the judgment; but the interest of such person must be a substantial one,—not that of love or affection of a relative,³ unless he is a presumptive heir of the party *non compos*.⁴ But the appeal may be taken by the lunatic in person, if taken during a period of sanity;⁵ and it is held, that every defendant in a statutory inquest of lunacy may personally appeal to the Supreme Court from a judgment rendered upon a verdict declaring him of unsound mind.⁶ The appeal must be in the name of the party affected by the proceeding; but it is held in Mississippi, that the appeal by the guardian is the appeal of the *non compos*.⁷

The decree of a probate court appointing a guardian is not, after reversal thereof by the Supreme Court, a sufficient objection to a suit against such person commenced against him after appeal, but before the reversal.⁸ Appeal from a judgment of the county court finding a person of unsound mind suspends the conclusive nature of such finding, but the judgment may be given in evidence as *prima facie* proof, during the pendency of the appeal, of the person's lunacy.⁹ So the appeal from the Circuit Court to the Supreme Court suspends, but does not abrogate the judgment of the Circuit Court until judgment is pronounced in the Supreme Court; if the appeal in error is dismissed, or abated, the judg-

¹ Commonwealth v. Beaumont, *supra*; McGinnis v. McGinnis, 74 Pa. St. 245, 247. proof of sanity of the party when making it.

² Cooper v. Summers, *supra*.

³ Penniman v. French, 2 Mass. 140.

⁴ Boynton v. Dyer, 18 Pickering, 1, 3.

⁵ Formby v. Wood, 19 Ga. 581, holding that the affidavit itself was *prima facie*

⁶ Cuneo v. Bessoni, 63 Ind. 524, 526.

⁷ Finny v. Speed, 71 Miss. 32.

⁸ Smith v. Davis, 45 N. H. 566.

⁹ Grimes v. Shaw, 2 Tex. Civ. Ap. 20. 23.

ment remains in force.¹ The right of an insane person to appeal from a judgment against him is not barred by limitation, unless the disability is shown to have been removed.²

The right to appeal is generally conditioned upon the party appealing giving bond for costs and the prosecution of the appeal; but in an early Massachusetts case it was held, that Bond is generally required. on an appeal from a decree of the judge of probate against the application of one who had been put under guardianship as *non compos*, to have the letters of guardianship revoked, the appellant need not give bond, for that while the party was under guardianship, his bond would be void, and if the guardianship were repealed, the appellants would not be entitled to costs.³

On appeal from the order of a probate court removing a guardian and appointing another, the newly appointed guardian is a necessary party.⁴

¹ *Thomasson v. Kircheval*, 10 Humph. 322.

² *Finney v. Speed*, 71 Miss. 32.

³ *McDonald v. Morton*, 1 Mass. 543. 547.

⁴ *Medbury, in re*, 48 Cal. 83.

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